2007

THE LEGISLATIVE ASSEMBLY FOR THE
AUSTRALIAN CAPITAL TERRITORY

BUILDING LEGISLATION AMENDMENT BILL 2007

REVISED EXPLANATORY STATEMENT

Presented by
Mr Andrew Barr MLA

Minister for Planning

BUILDING LEGISLATION AMENDMENT BILL 2007

Explanatory Notes

REFERENCES TO CERTAIN NAMES

The Planning and Development Bill 2006 was notified on the Australian Capital Territory legislation register in 2006. It is anticipated that if the Bill is passed, the subsequent law it will give effect to will indicate that its title is the *Planning and Development Act 2007*. Legislation naming convention requires the Act's name reflects the year it commenced. Therefore, in this explanatory statement, this Act is referred to as the *Planning and Development Act 2007.*

GENERAL OUTLINE

Purpose

The *Building Legislation Amendment Bill* (hereinafter referred to by that title or "the Bill") is a Bill for an Act to amend legislation because of the enactment of the *Planning and Development Act 2007* and to implement planning system reform, and for other purposes.

Objectives of the legislation – support a simpler, faster and more effective planning system

The *Building Legislation Amendment Bill* is intended to help make the planning system in Australian Capital Territory (herein after referred to as the "ACT" or as "Territory" as in "a Territory law") simpler, faster and more effective. The Bill will compliment and extend on the comprehensive reforms, which are the objectives of the *Planning and Development Bill 2006.*

The objectives of the *Building Legislation Amendment Bill* are to make several substantive new reform amendments as well as to make consequential amendments to the *Building Act 2004* ("the Building Act"), arising from the repeal of the Land Act and commencement of the *Planning and Development Act 2007.* The Bill also makes minor amendments to the *Construction Occupations (Licensing) Act 2004,* ("COLA") and the *Planning and Development Act 2007* to better facilitate the Building Act's interaction with those laws.

Fundamental objectives of the *Building Legislation Amendment Bill* are to facilitate—

- commencement of and consistency between the *Planning and Development Act 2007* and the Building Act;
- scope for greater involvement and responsibility of the private sector in regulating housing development; and
- enhancing the regulatory environment that the private sector must work within, commensurate with its increased responsibilities;
- enhancing regulatory systems around unlawful or otherwise unsubstantiated building work.

Reasons for the Bill

The Government launched the Planning System Reform Project in December 2004 with the aim:

> *to create a contemporary planning and land administration system, processes and practices that will provide greater certainty, clarity and consistency and which is flexible, timely, less repetitious and administratively manageable.*

The Government wishes to reform the planning system to save homeowners and industry time and money and give them greater certainty about what they need to do if they require approvals to undertake development on land including building, occupying or using buildings and structures.

People using the ACT's current planning system have sometimes found some aspects slow, cumbersome, inconsistent or confusing. Simple development proposals often require the same application and approval processes as complex proposals.

The new system will have less red tape and a wider level of exemptions from requiring development approval or building approval. This will make it easier to understand what building work does and does not need—

approval;

a builder's licence; or

a certificate of occupancy or use.

A central focus of the Bill is to make the amendments necessary to facilitated making private sector building certifiers a one-stop-shop for all of the plan approvals and associated certifications necessary to erect buildings that are exempted from requiring development approval.

Government will continue to have a role in auditing and regulating certifier's services, and in issuing the certificates needed to occupy or use a building, if the building is not exempt from requiring such certification. But in most other respects builders and landowners will mainly deal with the private sector for approval and certification of building work that is exempt from development approval requirements.

Ways in which the objectives are to be achieved

The *Building Act 2004* regulates the building construction or demolition aspects of the land development approval process that takes over from where the development approval process ends under the *Planning and Development Act 2007*. In simplified terms, unless exempted from requirements, building construction or demolition in the ACT is regulated under a statutory approval process that begins under the development approval provisions of the *Planning and Development Act 2007* (or its predecessors in function) and ends under the building approval, inspection and certification provisions under the Building Act.

The first part of the statutory approval process covers requirements to obtain development approval under the *Planning and Development Act 2007*, which regulates matters in the proposal such as amenity, urban planning, land use, effects on neighbours, streetscapes, and building siting, appearance and form.

The end stage of the process covers—

- obtaining building approval under the *Building Act 2004*, which covers matters including statutory warranties by builders, warranty insurance or its equivalent, structural integrity, safety, amenity, access and facilities for people with disabilities and energy efficiency; and
- having the work carried out or supervised by a licensed builder, and inspected and certified during construction by a licensed building surveyor; and
- obtaining from Government a certificate of occupancy or use for the completed building.

The respective roles of the regulators remain unchanged through the Bill's reforms, in that Government will remain the sole provider of development approvals and certificates of occupancy or use, and private sector building certifiers will remain the sole providers of building approvals and site inspections and certifications. (Although existing provisions permitting Government to step-in when the private sector fails to provide certification services will remain).

However, one of the most substantial reforms under the *Planning and Development Act 2007* is anticipated to exempt certain kinds of new houses from requiring a development approval, provided the proposal satisfies codified exemption criteria, which are comparable to the corresponding pre-reform development approval criteria.

Under the planning system reforms the function of verifying that such developments meet the development exemption criteria will fall to the certifier, in that the certifier is prohibited from issuing a building approval where a required development approval is missing. So an effect of making certain new houses exempt in that way is to remove from Government the function of checking that the proposal meets development approval criteria, and to instead make it the certifier's function to check that the proposal meets the same kind of criteria, which thereby makes the proposal exempt from requiring a development approval.

That is not a fundamental change to the certifier's role, and does not require a new skills-set, as certifiers have always been required by the Building Act to check that applications for building approval reflect proposed building work that either does not require development approval or is consistent with the terms of a respective development approval.

However, that increased responsibility of private sector certifiers precipitates many of the new reforms in the Bill, which seek to enhance the regulation of building work or the work of certifiers in their privatised regulator role. An expected outcome is that people seeking to build new houses covered by the anticipated exemption from requiring development approval will only have to deal with a single entity, the building certifier, to obtain all of the plan approvals necessary to commence construction. Prior to the reform, such work required—

> a development application to be lodged with the ACT Planning and Land Authority; and once that application was granted
>
> an application for building approval needed to be lodged with a private sector building certifier;
>
> and the building approval granted by the certifier.

The main substantive reforms in the *Building Legislation Amendment Bill* will be achieved through amendments that—

- widen building certifier's functions to include verifying that plans for ***building approval*** show sufficient information to determine if or not building work and other site work is exempt from requiring a ***development approval*** under the *Planning and Development Act 2007*. The pre-reform situation was that certifier's responsibilities were confined to ***building work***, but the reforms will widen the certifier's plan approval responsibility to encompass other proposed ***site work*** such as driveways and damage to or removal of trees. That complements reforms, which may enable certain houses to be exempted from requiring a development approval in certain circumstances; and

- empower building certifiers to require applicants for ***building approval*** to provide information or documents necessary to help decide the application, if the applicant does not agree to the certifier undertaking the work needed to procure those things. That is intended to assist applicants to gather the required documents or information to save on the certifier's costs of inspecting the site of the proposed work for example; and

- encourage certifiers to use electronic communication means of obtaining the above-mentioned information to help decide applications in certain circumstances. That is to take advantage of the economies and efficiencies achievable from certifiers establishing computer, telephone, fax or other information sharing systems with the custodians of the relevant information that certifiers regularly require, such as the ACT Land Titles Office;

- create new offences against a certifier if a certifier issues a ***building approval*** under the Building Act in contravention of the relevant requirements of the Building Act. That is intended to help ensure certifiers exercise due skill, care and diligence in checking the list of matters that need to be checked before issuing a building approval, as the reforms extend that list in some cases; and

- require certifiers to notify the chief planning executive of any suspicions that the certifier forms about site work being done in contravention of the *Planning and Development Act 2007*. That is to assist the chief planning executive in administering that Act and exercising compliance powers to prevent or rectify unlawful development in that certifiers, as privatised regulators, are required to inspect building work during construction and are therefore likely to discover relevant contraventions; and

- require the certifier to always notify the ACT construction occupations registrar if the certifier finds building work that is ***fundamentally noncompliant*** with certain Building Act requirements. That is a variation on a pre-reform requirement under that Act, but the earlier requirement allows the certifier some discretion in notifying matters that are subsequently brought into compliance. The Bill's new provision does not allow any discretion where work so grossly contravenes prescribed requirements that it is ***fundamentally noncompliant***. The provision allows a regulation to prescribe criteria for determining if work is ***fundamentally noncompliant***. That reform is intended to facilitate the registrar exercising compliance powers to prevent or rectify unlawful building work; and

- extend the grounds that may be relied upon to prohibit carrying out building work by written notice, a ***stop work notice***. The new grounds relate to building plans

containing materially false or contradictory information or information that materially misrepresents fact; and

- remove all provisions from the Building Act that have the effect of exempting buildings or building work from the application of all or part of that Act, to facilitate consolidation of all such provisions in a regulation. The *Building Regulation 2004* prescribes lists of such exemptions, but the Building Act has several provisions that have similar effect as exemptions under that regulation. An intention is to facilitate aligning certain development approval exemptions provided under the *Planning and Development Act 2007* with corresponding building approval exemptions, as far as possible, and placing all Building Act exemptions in one place in a consistent format that can be comparatively easily changed, by regulation amendment, to suit the changing building construction regulatory environment; and

- provide certain referral advice entities with powers to prevent the approval of a building approval application, and require those entities to be bound by their advice. A regulation is expected to prescribe which entities and to initially prescribe certain electricity, sewer and water supply utility operator(s), who are required to provide input about plans for proposed building work, particularly to help protect power lines or buried service pipes from damage by building construction. An intended outcome is to provide a greater level of certainty about referral entities advice for all stakeholders in line with similar provisions of the *Planning and Development Bill 2007*.

- provision of a process to permit a certificate of occupancy and use to be issued in certain circumstances where the pre-reform provisions do not cater for issuing such a certificate. That is to cater for circumstances where due to unlawful construction or for legitimate reasons the documentary evidence that building work complies with requirements is not reasonably available. An intended outcome is to provide a codified process, prescribed in a regulation, for determining if such buildings are ***tenable***, a term anticipated to be defined in the regulation to mean "justifiably safe and healthy to continue to occupy"; a meaning well known in the building design industry, particularly in fire safety engineering. If a building is ***tenable*** the process may permit the building's occupation and use, otherwise it may be unlawful to occupy or use such buildings, and the only remedy may be demolition. The process will not cater for untenable buildings and will not make buildings immune from being the subject of compliance actions such as Building Act notices to alter or demolish the building, or rectification orders under the *Construction Occupations (Licensing) Act 2004* or under the *Planning and Development Act 2007*; and

- change certain provisions, which unamended applied only to a ***person*** or ***people,*** so as they will apply to an ***entity***. That is to cater for the fact that building certifiers may be 'individuals, corporations or partnerships', all of which are 'entities', but under the *Legislation Act 2001,* the definition of ***person*** does not include a 'partnership', and

- make it clear that certain matters do not estop the issuing of rectification orders requiring rectification of work in relation to providing unlawful and substandard construction services under the *Construction Occupations (Licensing) Act 2004*; and

- provide that a stop work notice under the Building Act suspends a building approval. That is intended to make it clear that the existence of a building approval for building work does not of itself estop the issue of a stop work notice for the building work, unde the Building Act.

Alternatives to the Bill

Retaining the Building Act without the amendments the Bill provides would not have satisfactorily achieved a significant objective of the planning system reforms of the *Planning and Development Bill 2006*—the exemption of certain new houses from requiring development approval if the development complies with codified exemption criteria.

That is because the Building Act is the operational law that regulates how building surveyors must provide their services as building certifiers, but that Act has historically confined the role of certifiers to the realm of proposed buildings only.

The scope of the codified exemption criteria is anticipated to cover matters beyond the confines of the proposed building, and to cover other site work such as tree protection, driveways, carparking and open space requirements. Those matters were historically the purview of a development approval. To give effect to exempting those kinds of matters from requiring development approval, while still requiring compliance with commensurate exemption criteria, necessitates widening the certifier's role to encompass that kind of site work.

Exposing certifiers to matters that historically were the purview of a development approval also necessitates enhancing the regulatory environment certifiers must work within. That is because development approval matters present a different set of regulatory issues than those that certifiers deal with in only looking at building approval matters under the Building Act. For example, development approval matters include protecting neighbours from adverse impacts of overshadowing or overlooking by tall buildings proposed for erection close to neighbouring land boundaries. Ground levels therefore become critical benchmarks for determining neighbour amenity detriment levels. Certifiers therefore need enhanced powers to oversight compliance with ground level and building height requirements, for example. To help prevent unlawful work the powers need to be enforceable through denying permission for work to proceed, rather than merely advisory or recommendation powers through codes or guidelines.

Increasing certifiers' responsibilities by exempting houses from requiring development approval will increase certifiers' workloads and thereby increase consumers' costs in purchasing certifiers services. Certifiers' services are a mandatory requirement in building house, and Government does not compete in providing certifier services. It is therefore beneficial to provide certifiers with the power to require their clients to provide certifiers with the information the certifier needs to help determine building approval applications, except where the client agrees to have the certifier procure that information. That benefit is most effectively achieved through the relevant amendments in the Bill, as that centralises the application process and associated entitlements and powers in a single part of the Building Act and that is structured in a logical order that progresses from pre-application stage through to plan approval.

In summary, building certifiers are privatised regulators, and so widening and enhancing their functions is optimally achieved through the centralised regulatory requirements the Bill's amendments provide rather than through more fragmented and potentially less enforceable mechanisms such as guidelines or codes of practice.

Consultation

The Bill's main impetus is to play a role in giving effect to the planning system reforms which are mentioned above and mainly delivered through the *Planning and Development Act 2007*.

Consultations on those reforms focussed on the reforms provided in that Act but also encompassed the subsidiary and consequential reforms provided for in the Bill and ultimately delivered through the amended Building Act.

The earlier consultations are summarised as follows—

- Since 2004 there has been extensive consultation with all stakeholder groups on the planning system reforms as a whole. Key concepts and issues have been discussed thoroughly with the business community, building industry and professional organisations, particularly those representing the interests of builders, building surveyors and professional engineers.

- The Government's initial consultation invited comments on a directions paper and associated technical papers relating to four areas of planning reform. The relevant directions paper was *Technical paper 3—Streamlining development assessment and building approval processes in the ACT*. More than 60 stakeholders made a submission and over 260 comments were documented. The Government has reviewed those comments, as well as those of the former Planning and Land Council and an expert reference group, and decided which direction the reforms should take.

  Those reforms are mainly reflected in both the *Planning and Development Bill 2006* and the *Building Legislation Amendment Bill 2007*.

- There was also extensive consultation in relation to the *Exposure Draft Planning and Development Bill 2006*. The ACT Planning and Land Authority ("the authority") conducted stakeholder workshops, a series of consultation sessions with building surveyors (certifiers), and public briefings, through the community councils, between 13 July and 31 August 2006.

  Twenty-seven submissions on the Exposure Draft Planning and Development Bill 2006 were received from stakeholders and considered. In addition, comments were recorded from meetings and also were considered. The Planning and Environment Committee in its Report No. 22 of 2006 "Exposure Draft Planning and Development Bill" made 48 recommendations in relation to the exposure draft of the Draft Planning and Development Bill 2006, primarily focused on the refinement or clarification of particular provisions, and responding to key matters raised by stakeholders during its inquiry.

  In addition, the Committee suggested minor and technical amendments to the Bill as detailed in Table 1 of its report. Significant refinements were made to the Bill as a result of the Committee's recommendations and public consultation outcomes.

Offences in the Bill

The *Building Legislation Amendment Bill 2007* mentions the following Building Act offences, all of which are strict liability offences except where indicated otherwise below—

section 21 (3), which is not a new offence but is a restatement of the pre-existing provision;

section 21 (4), which applies the section 21 (3) offence grounds to partners of a partnership for the partnership's behavior and provides defences covering knowledge, reasonable precaution, appropriate diligence, and inability to influence conduct of the partnership;

section 43 (2) and **(3),** which are not new offences but are a restatement of pre-existing provisions with the addition of extra criteria of where the offence grounds do not apply;

section 44 (1), which is not a strict liability offence and is not a new offence but is a restatement of the pre-existing provision;

section 44 (2), which is not a new offence but is a restatement of the pre-existing provision with the addition of extra detail about what is required in the section 44 notice covered by the offence's grounds;

section 50 (1), which is not a new offence but is a restatement of the pre-existing provision with the addition of a prerequisite criterion relating to fundamentally noncompliant building work;

section 50B (1), which is against a certifier in relation to issuing a building approval in contravention of development approval requirements and provides defences covering taking reasonable steps to find out if development approval was required and being satisfied on reasonable grounds that it was not required;

section 50B (2), which is against a certifier in relation to issuing a building approval in relation to defective plans such that if not defective the section 50B (1) offence would have been committed. It provides defences covering taking all reasonable steps to find out if plans were defective being satisfied on reasonable ground that they were not;

section 50C (1) which applies the section 50B (1) offence grounds to the partners of a partnership for the partnership's behavior and provides the same defences as provided in section 50B (1). It also provides defences covering knowledge, reasonable precaution, appropriate diligence, and inability to influence conduct of the partnership;

section 50C (2) which applies the section 50B (2) offence grounds to the partners of a partnership for the partnership's behavior and provides the same defences as provided in section 50B (2). It also provides defences covering knowledge, reasonable precaution, appropriate diligence, and inability to influence conduct of the partnership;

section 64 (1), which is not a new offence but is a restatement of the pre-existing provision with the addition of an extra criterion to the pre-existing defence that relates to paying someone else to do the work mentioned in the offence grounds. The extra criterion relates to the defendant proving that they believed on reasonable grounds that the other person would do that work;

section 64 (2) which applies the section 64 (1) offence grounds to the partners of a partnership for the partnership's behavior and provides the same defences as provided in section 64 (1). It also provides defences covering knowledge, reasonable precaution, appropriate diligence, and inability to influence conduct of the partnership.

Penalties for those offences are set at levels commensurate with the comparable offence in the *Planning and Development Act 2007*, which relates to undertaking development in contravention of development approval requirements. Penalties for those offences are commensurate with comparable offences in other Australian jurisdictions.

The Bill has the effect of adjusting and supplementing the operation of some pre-existing offences in the Building Act. That is necessary to ensure that building certifiers that are a partnership are not excluded from the application of the kinds of regulatory controls that offences against individual or corporate certifiers provide. The effect is to make partners of partnerships liable for the offences, recognising that the partnership itself is not an entity that can be prosecuted. That has necessitated splitting of certain single offences into two offences—

one applying to a person—an individual person or a corporate person; and

a second separate offence that applies to the people who are partners of a partnership.

In all other comparable aspects, including penalty, the split offences mirror the pre-existing offences they replace, as adjusted by the Bill if that is the case. However, the defences provided in relation to offences that only apply to partners of a partnership have a much greater range of defences stipulated. That is in recognition of the fact that it is the behaviour of the partnership that gives rise to commissioning the offence, but a partner of the partnership may not be in a position to know about or do anything about the partnership's behaviour. For example it might not be just to hold partner X accountable for actions of their other partner, Y, in the partnership XY when —

X was unexpectedly incapacitated and hospitalised; or

X was not eligible for a licence authorising relevant services provided by XY under XY's partnership licence and therefore X could not be expected to know how services provided by XY complied with relevant technical provisions of laws regulating the licensable work; or

X took reasonable and calculated action to prevent Y from causing the partnership to commit an offence, but Y deliberately deceived X in causing the partnership to commit the offence nevertheless.

All of the new offences provided by the Bill are strict liability offences, although the Bill restates a pre-existing offence to which strict liability does not apply. The Bill does not cause any pre-existing offence that is not a strict liability offence to become an offence to which strict liability applies. The rationale for their inclusion as strict liability offences is to protect the health and safety of the public, and the fiscal and functional value of buildings. That is because failures by certifiers to exercise due skill care and diligence in exercising their relevant responsibilities in verifying that the minutia of technical design information shown in building plans, and building work as executed, have proven to result in—

unsafe or unhealthy buildings; or

buildings unable to be used for their intended purpose; or

buildings that when complete have to be demolished or altered to make them comply with laws including urban planning control instruments or the Building Code of Australia.

Under the *Criminal Code*, section 23, (Strict liability), ***strict liability offence*** means that there are no fault elements for any of the physical elements of the offence. That means that conduct alone is sufficient to make the defendant culpable. However, the mistake of fact defence

expressly applies to strict liability as does the other defences in the Criminal Code, Part 2.3, (Circumstances where there is no criminal responsibility). The Criminal Code, section 23(3) provides that other defences may still be available for use in strict liability offences. Defences such as intervening conduct or event (see the Criminal Code, section 39, (Intervening conduct or event)) are available for strict liability offences.

Strict liability offences do not have a fault element, termed 'mens rea'. However, strict liability does not oust a range of defences to criminal responsibility in Territory law. For example, a person may raise a defence that they were mentally ill at the time of committing a strict liability offence. 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. The prosecution must then disprove the existence of any defence beyond reasonable doubt. As the burden of proof on a defendant is an evidential burden, the defendant will only have to point to evidence that suggests a reasonable possibility that the defence applies.

Strict liability offences are an efficient and cost effective deterrent for breaches of regulatory provisions. They are appropriate where the prosecutor is in a position to readily assess the truth of a matter and that an offence has been committed. They can be dealt with by infringement notice, which is a cheaper and less time consuming alternative to a court prosecution, where laws provide for infringement notices covering the offence.

Strict liability is beneficial where offences need to be dealt with expeditiously to ensure confidence in the regulatory scheme. For example, if a house is built with a second storey without approval the public, in particular aggrieved neighbours, would expect effective and quick action to rectify the situation.

The necessity to prove intent affects the level of resources needed to investigate and prosecute. An effective enforcement regime is crucial for the ACT Construction Occupations Registrar to fulfil his or her role and responsibilities, as the regulator of builders and building surveyors, under the *Construction (Occupations) Licensing Act 2004* ("COLA") and under the Building Act. COLA provides that the Building Act is one of its operational Acts. Although COLA provides for licensing of builders and building surveyors, it is the Building Act that mainly regulates how builders and building surveyors provide their building or building certification services.

A widely publicised instance of that Registrar's inability to prosecute could seriously erode public confidence in the integrity of the construction occupations licensing scheme embodied in the *Construction (Occupations) Licensing Act 2004* and its operational Acts such as the Building Act. Evidence of intention or recklessness is often difficult to obtain in the absence of admissions or independent evidence. This in turn can reduce the effectiveness of using the prospect of prosecutions as a deterrent to impugned behaviour.

Strict liability offences reduce risks to the community. An adequately deterrent scheme to ensure building work is done only as approved under the Building Act reduces the risk of the community being affected by bad, inappropriate, inefficient, unsound, unsafe or unhealthy buildings or buildings that have inappropriate access or facilities for people with disabilities.

The provision for strict liability offences is consistent with recently enacted ACT legislation. The pre-existing provisions in the Building Act and the *Construction (Occupations) Licensing Act 2004* provide for strict liability offences. Strict liability offences are also used in other jurisdictions including the Commonwealth.

A tiered system of penalties can improve enforcement, provide flexibility and increase the range of regulatory options. There is an option to proceed under a fault liability limb of an offence if there is adequate evidence of the requisite mental element or under a strict liability limb where evidence of such intent is insufficient. Lower penalties for strict liability offences provide a safeguard for those affected.

The Bill inserts defences for several offences it establishes in the Building Act, but none are reasonable excuse defences. What constitutes a reasonable excuse largely depends on the purpose of the offence provision as well as the circumstances of the particular case. That means there is a high level of uncertainty in the application of the defence. Furthermore, an explicit 'reasonable excuse' defence is unnecessary because the Criminal Code, Part 2.3, (Circumstances where there is no criminal responsibility), now provides defences covering 'reasonable excuse' matters. For that reason the Bill does not provide explicit 'reasonable excuse' defences.

Where it is intended to provide a defence to a new offence in the Bill, which relies upon grounds of a person having taken reasonable precautions and exercised appropriate diligence to avoid the contravention, the Bill mentions such defence grounds. Reasons for the Bill not mentioning such grounds in respect of offences in the Bill are because the offence is not new, but rather is a restatement of an existing offence in order to show the context of a new offence, or to adjust wording around the provision. For example if grounds for existing offence A is to in effect be applied to a different person in new offence B, then the provision prescribing the offence for A might be recited in the Bill, and new offence B inserted below that recitation. In that case, the recitation of pre-existing offence A does not create a new offence. Rather it has no effect on the pre-existing offence or makes minor changes to its wording.

Defences were not added to pre-existing offences provisions as to do so was outside of the ambit of the Bill.

Sanctions inserted by the Bill mention penalty magnitudes by way of a 'penalty unit'. A penalty unit is defined in the *Legislation Act 2001* and is currently as follows—

(a) if the person charged is an individual—$100; or

(b) if the person charged is a corporation—$500.

Human rights issues

The strict liability offences could be argued to trespass unduly on personal rights and liberties and be a limitation on the right to be presumed innocent under the *Human Rights Act 2004* (the "HRA"), section 22, (Rights in criminal proceedings). However, it is considered that trespass is permissible as a reasonable limitation of rights under the HRA, section 28, (Human rights may be limited), which provides that 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, section 28 requires that any limitation or restriction of human 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—

impose on the defendant an evidential burden only. An evidential burden means that a defendant need only point to evidence that suggests a reasonable possibility that the matter in question exits. 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; and

do not lead to a reversal in the onus of proof; and

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.

Furthermore, as stated above, if strict liability applies, the defence of mistake of fact and other defences under the Criminal Code such as section 39, (Intervening conduct or event), may be available.

Another indication that the strict liability offences are a reasonable limitation under the HRA, section 28, is the low maximum penalty of 60 penalty units ($6,000 if a penalty unit is $100) and no imprisonment. The maximum penalty provided for by the *Building Legislation Amendment Bill 2007* for a strict liability offence is 60 penalty units. That Bill does not provide for imprisonment.

Of necessity the application of the HRA in circumstances such as those mentioned above does require some value judgments to be made. A judgment must be made about the value to society of the presumption of innocence as opposed to the protection of the community from development with unacceptable impacts on neighbours and the general community, the protection of the environment, and the protection of human health and safety. In assessing whether rights have been trespassed upon within permissible limits it is necessary to consider the objective of the offence and whether the trespass is proportionate to the objective served by the offence provision.

One of the biggest issues facing not just Australia but the world at this time is the destruction of the environment. Recent publicity has made dire predictions about the future if immediate action is not taken to ameliorate the continuing degradation of the environment. A significant proportion of human activity believed to be contributing to global environmental problems is the use of manufactured energy to artificially heat and cool the built environment. Recent amendments to the Building Code of Australia give effect to a widening of the code's ambit to include technical standards to regulate the energy efficiency of buildings. That code is given legal effect in the ACT by the Building Act. Contravening the code's energy efficiency provisions to achieve short-term cost savings in building construction can result in long term ongoing increased operating costs to heat and cool the building throughout its life, with the resultant increased use of manufactured energy.

The ACT Construction Occupations Registrar must be provided with an adequately deterrent scheme to ensure the protection of the community and the environment from unlawful building construction or demolition. It is also crucial that the registrar have the ability to act quickly and decisively, particularly in circumstances where delay may result in irreparable damage. For example, demolishing a bulk fuel depot other than in accordance with a building approval issued under the Building Act could result in an explosion or contamination of ground water or storm water with flammable liquids. As another example, demolition of the

former Canberra Hospital by explosives resulted in a piece of metal being shot across Lake Burley Griffin, striking and killing Katie Bender on 13 July 1997. At that time the Building Act provided that it did not have application to unleased land. The subsequent coronial inquest findings lead to the Building Act being amended so as its application is not dictated by land title matters, recognising the important public protection provided by the Building Act in regulating building construction, alteration and demolition wherever it occurs.

The objective of the legislation can only be achieved by removing the need for intent to be proven in a prosecution by way of strict liability offences because the purpose of the provisions is not to punish wrongdoing but instead is to protect the community.

The new offences in the Bill that can only apply to building certifiers are constructed so as they cannot apply to any entity other than a licensed building surveyor. That is because under the Building Act only licensed building surveyors are eligible to be appointed as building certifiers, and such appointments are suspended when the licence is not in force. Eligibility criteria for licensing building surveyors are such that only experienced university graduates qualified and experienced in the relevant field meet mandatory qualification requirements. Therefore the question of whether or not a certifier ought to have had sufficient knowledge to know about commissioning the relevant offences is much less likely to arise than if the offences applied to the general population.

Financial implications

Costs of implementation of the Bill will be met within existing resources. Ongoing administration of the resultant amended Building Act are not anticipated to cost more than the same costs prior to amendment, and are expected to be able to be achieved with current ongoing levels of resourcing.

There will be an adverse impact on Territory revenue as a result of a loss of development approval fees due to increased exemptions. That will be offset by general benefits to the community from streamlined planning and development assessment systems.

NOTES ON CLAUSES

The 1st clause, (Name of Act), names the Act that the Bill provides for, if the Bill is passed into law by the ACT Legislative Assembly, as the—*Building Legislation Amendment Act 2007*, which is herein after referred to as "the amending Act".

The 2nd clause, (Commencement), provides to the effect that the amending Act commences simultaneously with the commencement of the Act that the Planning and Development Bill 2006 is intended to give effect to if it is passed into law—the *Planning and Development Act 2007*. That is necessary as some provisions of both Acts interact with one another, requiring their commencement to coincide. Clause 2 also notes the effect on commencements of the Legislation Act, section 75 (1).

The 3rd clause, (Legislation amended—sch1), provides that the amending Act amends the legislation mentioned in schedule 1 to the amending Act. The Bill only has one schedule—schedule 1, which lists the legislation the amending Act amends and sets out the amendments that the amending Act will make to those laws if the Bill is passed into law.

Schedule 1, (Legislation amended)

Part 1.1, (Building Act 2004)

Part 1.1 lists amendments to the *Building Act 2004*, which is an Act to regulate the erection, alteration, demolition and occupation of building and structures, and for other purposes.

Clause [1.1] substitutes in the Building Act a recast section 7 and new section 7A**.**

Section 7, (Meaning of *building*), is similar to the provision it substitutes for. The main differences between new section 7 and the unamended provision include insertion of— sections 7 (2) (c) to (j), the example for paragraph 7 (2) (h), and new section 7A.

They are necessary to draw clearer distinctions between what aspects of development of a building site are within the meaning of the term ***building*** and aspects that are not. The need for enhancing that distinction comes about because some clauses in the Bill extend the application of the Building Act to ***site work*** that is not ***building work***; but otherwise the Building Act applies only to ***building work***.

The Building Act defines the term ***building work***, and it relies on the Building Act's definition of the term building. The Bill proposes a definition of ***site work*** in the Building Act's dictionary (see notes on amendments to the Building Act's dictionary further below). In new section 7 (2) (c)—

> the term 'paving' is intended to have the meaning it would normally have in relation to building construction and associated work. It is intended to include hard surfacing normally associated with making an exterior footpath, playground area or road, but not to include a building's concrete floor slab or stairway; and
>
> the term 'on the ground' is intended to include parts of a road sitting on soil fill or road-base but to exclude parts of road elevated above the ground on a bridge or ramp that spans across open space.

In section 7 (2) (d) the term 'surface-level' is intended to refer to a surface approximately at the outer surface of the earth, which can include the natural ground surface or ground surfaces altered by excavation or filling with earth. It is intended to no apply to surfaces of things not usually regarded as being the ground, such as a bridge or floor of a building.

In section 7 (2) (e) the term 'ground treatment' is intended to have the ordinary meaning that the term has in the landscape gardening realm. It is intended to include, in respect to the ground: gardening, digging, adding sand, soil, gravel or rock, paving in the context mentioned above, adding mulches and loose ground coverings, planting, turfing and cultivating plants.

In section 7 (2) (h) the term 'fittings' is intended to include things readily removed by hand without a tool and without breaking off the fitting, as opposed to a 'fixture' which is fixed and steadfast requiring a tool to remove it or for the fixture to be broken off to remove it.

Section 7A, (Meaning of *site work*), defines the new term ***site work*** so as it encompasses ***building work*** but also encompasses work other than ***building work*** that physically affects the building site where ***building work*** is carried out. The new section carries examples to help illustrate its effect. The examples of ***site work*** include the building of a house (which is also ***building work***) and the laying of paving for the house's driveway, which generally is not ***building work*** as a driveway is generally not a building or structure.

Clause [1.2] omits all of the Building Act, **section 10A, (Meaning of *minor maintenance work*)**, which defined the meaning of the term ***minor maintenance work***. The omission is

necessary to help fulfil the objective of centralising all provisions that exempt the application of the Building Act, in part or in full, in one place under a Regulation. The term ***minor maintenance work*** was used in provisions in the Building Act that are similarly omitted by the Bill and were in conjunction with certain exemptions applying to doing things in relation to bonded asbestos.

It is intended that a regulation will give effect to the omitted exemptions. The Building Act, **section 152, (Regulation making power),** entitles a regulation to exempt building work or buildings from all or part of the Building Act.

Clause [1.3] substitutes in the Building Act the note in **section 12, (Exempt buildings)** for 2 new notes—note 1 and note 2. Section 12 defines the term ***exempt building***. Note 1 is identical to the unamended note, and draws attention to some of the effects the term has on the Building Act. Note 2 is intended to draw attention to the fact that a regulation may also make exemptions which may or may not be termed ***exempt buildings*.**

Clause [1.4] omits from the Building Act all of **section 13, (Application of act to buildings and building work),** which provided exemptions for certain temporary buildings or temporary building work from the application of all or part of the Building Act. The omission is necessary to fulfil the objective of centralising all provisions that exempt the application of the Building Act, in part or in full, in one place under a regulation. It is intended that a regulation will give effect to the omitted exemptions. The Building Act, **section 152 (Regulation making power),** entitles a regulation to exempt building work or buildings from all or part of the Building Act.

Clause [1.5] omits from the Building Act all of **section 14, (Temporary exemptions for buildings),** which provided for temporary exemptions of certain buildings from the application of all or part of the Building Act. The omission is necessary to fulfil the objective of centralising all provisions that exempt the application of the Building Act, in part or in full, in one place under a regulation. It is intended that a regulation will give effect to the omitted exemption. The Building Act, **section 152, (Regulation making power),** entitles a regulation to exempt building work or buildings from all or part of the Building Act.

Clause [1.6] substitutes in the Building Act, subsection 15 (2) (b), which has the effect of omitting references to the term ***minor maintenance work***. Reasons for the omission are the same as set out above for clause 1.2.

Clause [1.7] omits from the Building Act all of **section 16, (Meaning of *stage* in pt 3),** which provided that in part 3 the term ***stage***, in relation to a stage of building work, meant a stage prescribed under the Building Act section 43 (1). The omission is necessary as the Bill inserts an updated definition for that term into the Building Act's dictionary.

Clause [1.8] inserts into the Building Act a note for division 3.2, (Certifiers and government certifiers), that draws attention to the fact that the division applies to ***building work*** and other ***site work***. That is necessary to alert users to that fact as division 3.2 historically has only applied to ***building work*** and not to other ***site work***.

The terms ***building work*** and ***site work*** are defined in the Building Act, although the Bill amends the definition of *building work* and inserts the definition of ***site work***. All ***building work*** is ***site work***, but ***site work*** also includes things that are not ***building work***, such as construction of driveways.

Clause [1.9] substitutes in the Building Act, in section 17, a new definition for the term ***eligible entity*** instead of for the term ***eligible person***. That is necessary because the

provisions that rely on the definition must be able to apply to all building certifiers, but not all certifiers are necessarily a ***person*** or ***people***. Certifiers may be a ***person***—a corporate person or an individual person; but may also be a partnership. The definition of ***person*** under the *Legislation Act 2001* does not include a partnership.

Clause [1.10] substitutes in the Building Act the preamble part of **section 18, (Eligibility for appointment—certifiers and government certifiers)**, to cater for the term ***entity*** instead of ***person***, for the same reasons set out above for clause [1.9].

Clause [1.11] substitutes in the Building Act all of **section 19, (Appointment of certifiers)**, with a new section 19 entitled 'Appointment of certifiers—work not begun'.

Section 19, (Appointment of certifiers—work not begun) only caters for work that has not begun (proposed work) distinguishes itself by its title from the new section 19A, which only caters for work that has begun. The unamended section 19 also only caters for work that had not begun, and without the Bill's new section 19A, the Act is silent on what do in the case where work had already begun. (See below about new section **19A (Appointment of certifiers—work begun)**).

Section 19A, (Appointment of certifiers—work begun), is also inserted by clause [1.11] and is necessary to cater for circumstances where a certifier might be needed to fulfil the Building Act's certification requirements in respect of work that has commenced. The provision does not apply to work that has begun and was carried out in contravention of the Building Act, **part 3, (Building work).** It is intended that if building work has been carried out in contravention of part 3, then section 19A does not permit a certifier to be appointed in respect of that work. That is to deter carrying out work in contravention of part 3, which regulates how building work must be carried out.

Section 19B, (Automatic suspension), is also inserted by clause [1.11] and suspends an entity's appointment as building certifier if the entity stops being an ***eligible entity*** under the Building Act. The Building Act, section 18, (Eligibility for appointment—certifiers and government certifiers) states the requirements for the entity to be eligible to be appointed building certifier under the Building Act, **section 19, (Appointment of certifiers).** One of the requirements is that the entity is entitled under the *Construction Occupations (Licensing) Act 2004* ("COLA") to perform services as certifier for the work. A relevant COLA requirement is that the entity is a licensed building surveyor under COLA.

Without new section 19B when a licensed building surveyor's licence ended because its expiry date was reached (COLA stipulates such licenses expire no later than 1 year after issue), the Building Act, section 19 (2) (a), unamended by clause [1.11], stopped the entity being eligible to be a certifier, thus ending the entity's appointments as certifier. The only way to overcome that automatic ending of appointments was to renew the licence so as there was a continuity of licence; that is, so as the entity maintained a continuity of eligibility to be certifier.

However, that is not always possible because eligibility for licence renewal is dependant on mandatory professional indemnity insurance coverage, by virtue of the relevant requirements under COLA. If there was not continuity in that coverage, because there was a period of as little as 1 day when the entity was not covered by insurance, the licence could not provide continuity across the uncovered period.

To resolve that anomaly, new section 19B merely suspends the entity's appointment as certifier when the entity ceases being eligible to be certifier. An intended outcome is that instead of the appointment ending, it is suspended, meaning that the appointments continue to

stand but their effect is suspended. When the suspension ends, if nothing else has intervened to end or change the appointment, the suspended appointments automatically regain their full effect.

That will avoid the certifier's clients having to reappoint the certifier merely because the certifier failed to maintain licence continuity, if the certifier renews the expired licence within timeframes that the suspension may operate under (see timeframes under the new section **19C (Ending suspension)** and new section 19D (Ending appointments), and notes below about those provisions.

Section 19C, (Ending suspension), is also inserted by clause [1.11] and sets out the circumstances that must exist for a suspension under section 19B, (Automatic suspension), to end. There are 2 circumstances mentioned, and only one of those circumstances need exist for the suspension to end. The first circumstance is under section 19C (2) (a) and is that the entity suffering the suspension becomes an ***eligible entity*** again. The Building Act, **section 17, (Definitions for div 3.2),** defines what an ***eligible entity*** means, and the details are in the Building Act, **section 18, (Eligibility for appointment—certifiers and government certifiers).** An example of a section 19C (2) (a) circumstance for an entity that was suspended because the entity's licence under COLA ended, is that the licence is renewed.

The second circumstance is under section 19C (2) (b) and is that the appointment as certifier of the entity suffering the suspension ends. That is to make it clear that a suspension of a certifier's appointment as certifier cannot extend past the end of the appointment. The Building Act sets out various matters that can cause an appointment to end, as does the Bill at new section **19D, (Ending appointments),** (see below).

Section 19D, (Ending appointments), is also inserted by clause [1.11] and sets out the circumstances that cause a certifier's appointment as certifier to end. The section provides for the same appointment-ending criteria as provided for by the Building Act prior to amendment by Clause [1.11], but also inserts new criteria at sections 19D (1) (c), (d) and (e). It is intended that a new appointment could be made in respect of matters identical to those of an appointment that has ended, provided the relevant requirements of the Building Act that apply to the new appointment are satisfied. For example, if an appointment of a certifier for a proposed house ends, that ending does not prevent the certifier being appointed again for the same proposed house provided the requirements applicable to the appointment are satisfied.

Section 19D (1) (a) entitles the relevant landowner to revoke the appointment of a building certifier under the Building Act, **section 19, (Appointment of certifier—work not begun)**, or **section 19A, (Appointment of certifier—work begun).** Appointments are in respect of building work on land, and therefore attach to—the land and the building work, rather than attaching to the entity that made the appointment. Therefore the landowner mentioned in Section 19D (1) (a) need not be the same landowner who appointed the certifier, but must be the landowner in respect of land to which that appointment is attached. That caters for circumstances such as where title to the land has changed since the appointment was made. Such a change in title does not of itself end an appointment. Section 19D (1) (a) operates in respect of singular appointments only, and does not operate across multiple appointments unless it is individually applied to each appointment.

Section 19D (1) (b) provides that the certifier may end the appointment as certifier if the certifier resigns the appointment. Section 19D (2) prohibits such a resignation except where the approval and notification requirements mentioned in that subsection are satisfied. An intention in limiting the circumstances when a certifier may resign the appointment as certifier is to help ensure that certifiers do not react to problems associated with detecting

noncompliant building work by resigning as certifier to escape their responsibilities to intervene in the problems. That recognises that certifiers are privatised regulators and have responsibilities under the Building Act, **section 44, (Stage inspections),** to inspect building work and check for compliance with the Building Act and to give directions on how to bring any non-compliant work into compliance. Section 19D (1) (b) operates in respect of singular appointments only, and does not operate across multiple appointments unless it is individually applied to each appointment.

Section 19D (1) (c) provides that the certifier's appointment as certifier ends if the appointment has been suspended for a single period of 3 months. That is to ensure suspensions under section 19 do not continue in perpetuity, as the suspension is mainly intended to cover the short period for which the entity may have not been able to maintain licence continuity for (see above notes on clause [1.11] that relate to licensing for further explanation of licensing requirements). It is intended that section 19D (1) (c) does not apply if the total of several suspension periods total 3 months or more, if no individual period lasted 3 months or more without interruption of the suspension. Section 19D (4) provides that if section 19D (1) (c) ends an appointment the ending occurs on the start of the day that is after the day that the 3-month period month period end on. Section 19D (1) (c) operates in respect of every appointment that is in effect in respect of the entity on the day the section applies to the entity.

Section 19D (1) (d) provides that the certifier's appointment as certifier ends if each of the criteria of sections 19D (1) (d) (i) to (iii) apply. An intention is that the appointment as certifier ends when there is no further need to obtain the certifier's services in respect of the building work that the appointment relates to, because the work is finalised and certificate issued for the work under the Building Act, **part 5 (Building occupancy)**. However, because such certificates may cover only part of the building or be subject to requirements to do further building work, the certifier may be required to provide services in relation to such further or other work. The criteria at sections 19D (1) (d) (ii) and (iii) cater for such circumstances and prevent the appointment ending only because such a certificate has been issued.

Section 19D (1) (d) operates in respect of singular appointments only, and does not operate across multiple appointments unless it is individually applied to each appointment.

Section 19D (1) (e) provides that the certifier's appointment as certifier ends if it has been 5 years since that certifier was last appointed for a particular building work project. That is to ensure appointments do not continue in perpetuity, as the Building Act does not provide for the automatic ending of appointments by the passage of time. That will assist in regulating the number of active appointments that an entity can be taken as having afoot at any particular time, and allow certifiers to close their files on projects that have dragged on beyond the 5-year period. Where a project takes more than 5 years to complete, nothing necessarily prevents the certifier from being appointed for the work more than once to achieve contiguous 5 year appointment durations, provided the requirements for appointment are satisfied on each occasion an appointment is made.

The Building Act, **section 36, (Period for which approvals operate),** provides to the effect that building approvals cannot operate for longer than 3 years after they were issued. Such a limitation has operated for decades, with most building construction being completed within that time, or larger long-term projects being staged with staged building approvals. The 5-year period in proposed section 19D (1) (e) is expected to be sufficient time to cater for small and medium-term projects, and recognises that long-term projects are usually staged with

multiple building approvals and can continue to be staged with multiple appointments of certifiers every 5 years.

Section 19D (1) (d) operates in respect of singular appointments only, and does not operate across multiple appointments unless it is individually applied to each appointment.

Section 19D (2) prohibits a certifier from resigning under new section 19D (1) (b) except where the approval and notification requirements mentioned in that subsection are satisfied. An intention in limiting the circumstances when a certifier may resign the appointment as certifier is to help ensure that certifiers do not react to problems associated with detecting noncompliant building work by resigning as certifier to escape their responsibilities to intervene in the problems. That recognises that certifiers are privatised regulators and have responsibilities under the Building Act, **section 44, (Stage inspections),** to inspect building work and check for compliance with the Building Act and to give directions on how to bring any non-compliant work into compliance. The section 19D (2) prohibition is in effect the same as that which the Building Act provided for prior to the Bill's amendments.

Section 19D (3) sets out 3 criteria, 1 of which must apply before the construction occupations registrar may approve a resignation as certifier under section 19D (1) (b). The registrar is established under COLA, **section 103, (Construction occupations registrar)**. An intention in limiting the circumstances when a certifier may resign the appointment as certifier is to help ensure that certifiers do not react to problems associated with detecting noncompliant building work by resigning as certifier to escape their responsibilities to intervene in the problems. That recognises that certifiers are privatised regulators and have responsibilities under the Building Act, **section 44, (Stage inspections),** to inspect building work and check for compliance with the Building Act and to give directions on how to bring any non-compliant work into compliance.

The section 19D (3) criteria are in effect the same as those that the Building Act provided for prior to the Bill's amendments.

Clause [1.12] substitutes in the Building Act all of section 21 to recast the section.

Section 21, (Power to require building documents) as recast is similar to the provision it substitutes for except the recast provision mentions ***entity*** where the unamended provision mentioned in some cases ***person***, and the unamended offence provision is in effect now split into 2 separate offences—1 applies only to a ***person*** in respect of the person's behaviour and the other applies to partners of a partnership in respect of the partnership's behaviour. See notes above on clause [1.9] for further explanation about why certain provisions need to be amended so as they apply to entities rather than ***people*** or a ***person***.

Section 21 is intended to facilitate the continuance of building work when a government certifier takes over as certifier for the work. Otherwise building work may not be able to lawfully continue where certain ***building documents*** that provide evidence of the lawful nature of the work are not available to the government certifier. For example, the Building Act requires concrete floor slabs for houses to be inspected when the slabs are ready to have the concrete place, but before it is placed. That is so the certifier can check if the foundation material, dimensions of the slab, and reinforming meet requirements of the Building Act, for example. If the concrete is placed and the government certifier is unable to obtain documented evidence that the former certifier passed the slab inspection stage before the concrete was placed, it may be impractical to proceed with the work without demolishing the slab and remaking it, because the government certifier may not be satisfied about the legitimacy of the slab's construction. In that case section 21 entitles the government certifier

to require the former certifier to give the government certifier ***building documents*** (inspection records, certifications or other documents) the former certifier made in relation to the slab inspection.

Section 21 (6) defines what is meant by the term ***building document***. ***Building documents*** are any of the documents that a certifier is required to give the construction occupations registrar under the Building Act, **section 48 (Completion of building work)**, which covers the range of documents a certifier handles in the course of approving plans and inspecting and certifying building work.

Clause [1.13] substitutes in the Building Act all of **subsection 23 (4), (Entitlement to act as certifier),** to make minor amendments to its phraseology and a consequential change to a cross-reference it mentions. The recast provision has similar effect to the provision it substitutes for.

Clause [1.14] substitutes in the Building Act all of **section 24, (Notice of certifier's appointment or end of appointment),** to recast the section. The recast provision is virtually identical to the provision it substitutes for except—

the recast provision mentions ***entity*** where the unamended provision mentioned ***person***; and

section 24 (3) is omitted from the new provision.

See notes above on clause [1.9] for further explanation about why certain provisions need to be amended so as they apply to ***entities*** rather than ***people*** or a ***person***.

Section 24 (3) indicated that an offence against subsection 24 (2) was a strict liability offence. The Bill omits it because there is no sanction mentioned for the offence, and contravention of subsection 24 (2) is effectively regulated through licence disciplinary action provisions under COLA, **section 54 (Disciplinary grounds),** which makes any contravention of the Building Act a licence disciplinary ground.

Clause [1.15] inserts into the Building Act sections 25A, 25B and 25C.

Section 25A, (Overview—div 3.3), provides an overview of how the Building Act, **division 3.3, (Building approvals)** operates. An intention is to draw attention to the interaction between—

section 27, (Certifier not to consider certain applications); and

section 28, (Issue of building approvals); and

section 28A, (Marking building approval); and

section 29, (Approval requirements); and

section 30, (When building approvals not to be issued—general); and

section 30A, (When building approvals not to be issued—advice on referral).

Those provisions cover—

applications for building approval, which is an approval under the Building Act, section **28, (Issue of building approvals),** of the plans that show proposed building work; and

how the certifier handles and decides the application; and

how the certifier must issue and mark the building approval; and

things that prevent the approval being issued.

Section 25B, (Why are building approvals necessary?), indicates why building approvals, which are approvals of the plans that show proposed building work, are required under the Building Act. It lists a summary of some of the provisions that require a building approval. The section is explanatory only.

The provision mentions the term ***approved plans***, and that term is defined under the Building Act to mean plans for which a building approval is in effect. That meaning is reiterated in section 25B (1) (a). Building approvals may be granted under the Building Act, **section 28, (Building approvals).**

Section 25B refers to the Building Act, **section 42, (Requirements for carrying out building work)**, which at subparagraph 42 (1) (d) (i) requires building work to only be carried out in accordance with approved plans.

Section 25B also carries a note, note1, which draws attention to the fact that not complying with section 42 may also be grounds for disciplinary action under the *Construction Occupations (Licensing) Act 2004* ("COLA"). That is because COLA, **section 54, (Disciplinary grounds),** makes any contravention of the Building Act a licence disciplinary ground under COLA, and COLA, **section 16, (What is an operational Act?)**, makes the Building Act a COLA operational Act.

Section 25C, (Building approvals apply to building work), clarifies that a building approval under the Building Act, section 28, only relates to ***building work***, as defined in the Building Act, section 6, (Meaning of *building work*). That is necessary because the approved plans that building approvals are issued for often contain a lot more information than just the details about building work, as discussed below.

Site work that is not building work

The Bill amends the Building Act to require plans for building approval to not only show the proposed *building work* (a house for example), but to also show certain associated other *site work* that is not *building work* (driveway paving for example). An effect of section 25C is to make it clear that the building approval applies only the *building work* in the plans (only the house, for example) and does not apply to other *site work* shown on the plan (it does not apply to the driveway paving for example). That is the case despite the fact that the certifier might have been required to ensure that the other *site work* (such as the driveway) complied with relevant requirements of certain specified applicable laws.

Building approval does not approve site work for construction

Another effect of section 25C is to clarify that although the certifier might have been required to check if non-building work matters, such as driveways, comply with certain specified requirements, such as the territory plan or a development code, that does not mean that it will necessarily be lawful to construct the non-building work in accordance with the plans bearing a ***building approval***. That is because there might be a requirement of a law that applies to the non-building work that the certifier was not required to check for compliance with, or the certifier may have erred in checking, and building to the plan might thereby be unlawful.

Site work might require a development approval

All ***building work*** is ***site work***, but ***site work*** also includes things that are not ***building work*** (such as driveway paving). The *Planning and Development Bill 2006* has application to all ***site work*** and unless that Bill or it subsequent Act exempt site work from relevant provisions,

it might be unlawful to construct, alter or demolish ***site work*** without a development approval under that Act. That Bill has provisions for enforcement of development approval requirements, including offences and rectification order powers, whereas the Building Act's enforcement powers in relation to work carried out generally only apply to ***building work***.

Pre-existing building work verses proposed building work

The Building Act requires plans for building approval to show pre-existing *building work*, such as a proposal to alter a building (such as a renovation or an extension), and to show the pre-existing building (an old house for example). In that case if the plans do not make it clear that the pre-existing part is not part of the proposed *building work*, the approved plans may be misconstrued as implying that the building approval applies to the pre-existing part and the proposed part, whereas it was intended to only apply to the proposed part. Section 25C permits the plans to show that the pre-existing *building work* is not part of the *building work* covered by the building approval.

Building work beyond the scope of the application

The Building Act requires the owner of the relevant land to apply for a building approval as a pre-requisite to a certifier issuing the approval. Section 25C makes it clear that a building approval does not operate in respect of ***building work*** not covered by the scope of the application. An effect of that provision is to prevent the ***building approval*** from operating on a parcel of land other than a parcel to which the application for the approval relates. That is necessary to ensure that building approvals only operate in respect of the land for which the application related. That ensures only the relevant landowner can obtain a building approval, and where the approval is for work that is situated on 2 or more land parcels, all relevant land owners must make the application. That provides a measure of protection for landowners to ensure they control what approvals are granted for work on their land. That is particularly important where the approval is for demolition of a building.

Examples of effect of section 25C

Section 25C also carries examples to explain and illustrate the effect of its respective provisions. The example of '**work other than building work shown in approved plans**' illustrates how certain ***site work***, such as certain kinds of paving cannot form part of a building approval, as that kind of paving is not ***building work*** under the definition for ***building work*** set out under the Building Act, **section 6, (Meaning of building work)**, whereas fences are building work, so could form part of a building approval. However, if a regulation makes ***building work***, such as certain kinds of fences, exempt from the application of the Building Act, **part 3, (Building work),** that kind of exempted fence cannot form part of a building approval as part 3 provides for the issuing of building approvals and part 3 cannot be applied to building work that is exempt from the application of part 3.

Clause [1.16] inserts into the Building Act sections 26A, 26B and 26C.

Section 26A, (Certifier may require further information—applications for building approval), entitles the certifier for building work to ask an applicant for a building approval to give the certifier stated further information in relation to the application if the certifier believes on reasonable grounds that the information will help the certifier to decide the application without personally inspecting the land where the building work is to be carried out. Subsection 26A (1) sets out prerequisite criteria, all of which must apply before section 26A applies.

That will benefit some applicants as the section 26A power will assist applicants to understand what documents or information they are required to gather to save on the certifier's costs of inspecting the land where work is proposed for example. However paragraph 26A (1) (c) provides that the power does not apply where the applicant has agreed with the certifier that the certifier will obtain the further information.

Section 26A (3) lists certain specific matters that the section 26A power does not extend to, but is not a list of all such matters, as the power is expressed more generally and does not encompass all manner of things that fall outside its ambit.

Section 26B, (Contents of request for further information), sets out the information that requests under section 26A must state, as well as the timeframes that the request must indicate apply. Section 26B (2) entitles the request to require the applicant for building approval to verify by statutory declaration under the *Statutory Declarations Act 1959* (Commonwealth), all or part of the information that the request covers. That is intended to provide certifiers with a tool to dissuade the provision of false or misleading information.

Section 26C, (Effect of failure to provide further information—applications for building approval), entitles a building certifier to refuse to grant the building approval under the Building Act, section 28, if section 26C (1) applies. Section 26C (1) sets out criteria that make section 26C apply—

a certifier has asked for further information under section 26A in relation to an application; and

the applicant has not provided some or all of the information in accordance with the request; and

the applicant and the certifier have not agreed that the certifier will obtain the further information.

The section 26C power to refuse to issue a building approval is necessary so that the certifier can close off applications that have failed to be accompanied with, or supported by, the information that the certifier reasonably needs to decide the application. Nothing in the Building Act or Bill is intended to prevent—

anyone from giving such information to the certifier to avoid the certifier refusing the application, prior to the certifier refusing the application; or

the certifier revoking such a refusal and issuing the building approval, provided the requirements for the approval are satisfied and the certifier is entitled to issue the approval; or

the certifier personally procuring the information despite a section 26 notice requiring someone else to procure it.

It is intended that the section 26C power to refuse to issue a building approval be exercised at the certifier's discretion, and nothing in the Bill or Act is intended to compel the certifier to exercise that power.

Clause [1.17] substitutes in the Building Act paragraph 27 (1) (b) to adjust its wording to cater for the fact that in the Building Act, references to terms like 'consultations with, or the consent of approval of an entity' are replaced by the Bill with the concept of referral 'entity's advice'. That is to align such provisions with the corresponding provisions in the Planning and Development Bill 2006.

Part of the statutory approval process in the Building Act requires plans, which form part of an application for building approval under the Building Act, to be referred to certain entities to obtain the entity's views on the proposal. Such entities include the ACT Fire Brigade, to obtain the Brigade's views on fire safety provisions shown in the plans for example. The statutory approval process also requires certain entities to provide input about the way certain kinds of buildings have been completed. The ACT Fire Brigade is also such an entity.

Clause [1.18] substitutes in the Building Act paragraph 28 (1) (c) with new paragraphs 28 (1) (c) and 28 (1) (d).

New paragraph 28 (1) (c) makes necessary consequential amendments brought about by the Bill's amendments to the Building Act, **section 30, (When building approvals not be issued—general),** and insertion of new **section 30A, (When building approvals not be issued—advice on referral)**. New paragraph 28 (1) (c) refers to those sections, and has the effect of making the Building Act, **section 28, (Issue of building approvals)** redundant if new sections 30 or 30A apply to an application for building approval. The overall effect of new paragraph 28 (1) (c) is to prohibit a certifier from issuing a building approval in respect of plans for proposed building work in circumstances where sections 30 or 30A prevent the issue of a building approval.

New paragraph 28 (1) (d) sets out an additional new criterion that must be satisfied for section 28 apply, as follows—

> if there is a written agreement between the certifier and applicant for the payment of an amount for deciding the application and the agreement states that the amount is to be paid before the application is decided—the amount has been paid.

That is necessary as section 28 (2) requires the certifier to issue a building approval if satisfied on reasonable grounds that the plans meet each approval requirement under section 29, generally involving significant investigatory work by the certifier. So without new paragraph 28 (1) (d), section 28 (2) could otherwise require the certifier to undertake work for which the certifier has not been paid.

It is intended that in section 28 the term "paid" encompasses the certifier being given the respective consideration under a contract, including being paid cash or remunerated in some other way under the relevant term or terms of the contract.

Clause [1.19] substitutes in the Building Act subsection 28 (2) with new subsections 28 (2) and 28 (2A).

The unamended subsection 28 (2) required the certifier to issue a building approval if satisfied on reasonable grounds that the plans meet each approval requirement under section 29, (Approval requirements), whereas the substitute new subsection 28 (2) firstly requires the certifier to take all reasonable steps to get the information the certifier reasonably needs to decide the application as soon practicable after receiving an application for building approval under **section 28, (Building approval applications)**.

Subparagraph 28 (2) (b) (i) then requires the certifier to certify what approval requirements under the Building Act apply to the application and why the building approval is not

prevented from being issued, if the plans forming part of the application meet each approval requirement of section 29, and neither sections 30 nor 30A prevent the approval being issued. The certifier's certification is referred to in new section 28 as a ***building approval certificate***. It is intended to act as a checklist to ensure the certifier documents and certifies the outcome of the all of the matters the certifier is required by the Building Act to check as a prerequisite to determining if a building approval can be issued in respect of each proposed building project the certifier is given as part of an application, under the Building Act, section 26 (1), for building approval.

Subparagraph 28 (2) (b) (i) then requires the certifier to issue the building approval and give the building approval certificate to the applicant for the approval.

Subsection 28 (2) also carries 2 notes—notes 1 and 2. Note 1 draws attention to the fact that under the Building Act, **section 151, (Approved forms),** if a form is approved for the subsection 28 (2) provision, the form must be used. Section 151 entitles the ACT Construction Occupations Registrar, who is appointed under the *Construction Occupations (Licensing) Act 2004*, to approve forms for the Building Act, and requires the forms made that way to be used for the purpose they are made if they are made for a purpose. An example of the effect of section 151 on subsection 28 (2) could be that the registrar could approve in writing under section 151 a form for the purpose of making the above-mentioned ***building approval certificate***. If that is the case, under the Building Act, section 151 (2), the form must be used for that purpose. Such a form could include a checklist all of the matters that the certifier is required by the Building Act to check under section 28 (2), thereby requiring the certifier to certify the outcome of the application of that section to each item in the checklist.

Note 2 draws attention to the fact that under the Building Act, **section 150, (Determination of fees)**, a fee may be determined for the purposes of section 28. Section 150 provides that the Minister responsible for administering that provision of the Building Act may determine fees for the Building Act. An example of the effect of section 150 on section 28 is to require the certifier to pay a fee determined under section 150 if the certifier grants a building approval under section 28. The fee determination may include a statement about the amount of the fee and whom it must be paid to.

New subsection 28 (2A) clarifies that despite subsection 28 (2) requiring the certifier to, in certain circumstances, issue a building approval as soon as practical after receiving an application for the approval, the certifier is not required to decide such an application if the applicant has asked the certifier to delay deciding the application. That is necessary to ensure that certifiers do not otherwise refuse the application, as making a fresh application may require the payment of determined fees again.

Clause [1.20] substitutes in the Building Act, subsections 28 (3) to (7), with new section 28A. The unamended subsections 28 (3) to (7) covered marking of building approval upon plans and other documents and giving the approval and other documents to the ACT Construction Occupations Registrar, who is appointed under the *Construction Occupations (Licensing) Act 2004* ("COLA").

Section 28A, (Marking building approval), makes equivalent provisions to those its substitutes for, but clarifies the situation where plans are too numerous to have the approval marked or attached to each page. The new provision—

mentions "the certifier's licence number" whereas the unamended mentioned "his or her licence number". That is to cater for the fact that a certifier can be an individual,

corporation or partnership, so the term "his or her" is not an appropriate descriptor of a certifier that is a corporation or partnership; and

requires each marking to include the date it is marked, which was not a requirement of the unamended provision. That is to help determine the length of time the building approval is in force and who made what approval-related markings on which plans and when.

In the case of a certifier being a corporation of partnership, where section 28A requires the certifier to mark its licence number and to initial the marking, it is intended that—

the initials be hand-signed, or a copy of the hand-signed initials marked by the person who made the original, for the added deterrence against fraudulent markings that provides;

and for the initials to be of the person who the corporation or partnership authorises to mark their initials for the corporation or partnership for the Building Act, section 28A, consistent with laws in force in the Territory, including the Building Act and the provisions in COLA about nominees for corporations or partnerships licensed under COLA.

An intended effect of section 28A is also to ensure that each page of the plans forming part of a building approval, ***approved plans***, be marked in accordance with section 28A, including with the initials of the person making the marking, to help make it clear which pages of the plans are the subject of the building approval, and which are not, in the case of other pages being attached to the approved plans.

Section 28A makes several mentions of the term ***accompanying document***, which is defined in section 28A (5).

Subsection 28A (4) carried 2 notes—notes 1 and 2. Note 1 draws attention to the fact that under the Building Act, **section 151, (Approved forms),** if a form is approved for notification, under section 28, of an appointment as certifier, the form must be used. Section 151 entitles the ACT Construction Occupations Registrar, who is appointed under the *Construction Occupations (Licensing) Act 2004*, to approve forms for the Building Act, and requires the forms made that way to be used for the purpose they are made if they are made for a purpose.

Note 2 draws attention to the fact that under the Building Act, section 150, (Determination of fees), a fee may be determined for the purposes of section 28A. Section 150 provides that the Minister responsible for administering that provision of the Building Act may determine fees for the Building Act. An example of the effect of section 150 on section 28A is to require the certifier to pay a fee determined under section 150 if the certifier gives the registrar documents under section 28A. The fee determination may include a statement about the amount of the fee and whom it must be paid to.

Section 28A (5) carries a note drawing attention to the fact the Building Act, **section 26, (Building approval applications),** mentions certain documents that must accompany applications for building approval under the Building Act, section **26, (Building approval applications),** and that a regulation may also require such documents.

Clause [1.21] substitutes in the Building Act, paragraph 29 (1) (b) with new paragraphs 29 (1) (b) and 29 (1) (ba).

New paragraph 29 (1) (b) is the same as the unamended paragraph it substitutes for, and sets out the plan approval criteria requiring plans to reflect a building that if built to the plans will comply with the Building Act. It applies to plans that are for the erection or alteration of a

building. A reason that the erection or alteration of a building might not comply with the Building Act could include the lack of existence of a development approval required under the *Planning and Development Act 2007* for the proposed work, for example.

However, because paragraph 29 (1) (b) ultimately seeks to ensure buildings comply with the Building Act, it is not clear how it caters for the demolition of buildings, as a building that is completely demolished can no longer comply with the provisions of the Building Act that apply to buildings. The Building Act, **section 6, (Meaning of *building work*)** includes in that meaning "work in relation to the demolition of a building". Therefore the Building Act's provisions about building work apply to the demolition of a building unless indicated otherwise.

Therefore to clarify that the Building Act's plan approval requirements cover plans showing work to demolish a building, the Bill inserts paragraph 29 (1) (ba) to cater for demolition of buildings. The plan approval criteria it sets out requires that plans, that are for the demolition of a building, show demolition that will comply with the Building Act. A reason that demolition might not comply with the Building Act could include the lack of existence of a development approval required under the *Planning and Development Act 2007* for the demolition, for example.

Clause [1.22] inserts into the Building Act paragraph 29 (1) (f) to assist in giving effect to a reform provided by the *Planning and Development Act 2007*. Paragraph 29 (1) (f) anticipates that—

> a regulation under the *Planning and Development Act 2007* might widen the scope of exemptions from the requirements of that Act to obtain a development approval, to encompass a widened extent of ***building work*** than previously; and
>
> the terms of some of those exemptions are anticipated to require the ***building work*** and other land development associated with the ***building work*** to comply with detailed technical requirements of the kind that were prerequisites for obtaining a required development approval under the *Land (Planning and Environment) Act 1991*; and
>
> such requirements for a house could include matters such as driveway location, tree protection, and the amount of space on a land parcel that must not contain certain kinds of buildings.

To cater for such requirements, and to enable the certifier to decide if a development approval is required for proposed ***building work***, when deciding an application for building approval under the Building Act, **section 28, (Issue of building approval),** new paragraph 29 (1) (f) widens the requirements of plans for building approval to require the plans to show all the information necessary to establish if physical development, of the land, associated with the proposed ***building work***, will be exempted under the *Planning and Development Act 2007* from requiring a development approval under that Act. The new paragraph provides a requirement that the plans must show ***site work*** that if carried out in accordance with the plans might be exempt under the *Planning and Development Act 2007* from requiring a development approval under that Act. Subparagraph 29 (1) (f) (i) stipulates to the effect that the plans must show all of the information necessary to establish if or not the site, if constructed to the plans, would comply with the terms of the exemption from the requirement to obtain development approval. The Bill also inserts into the Building Act's dictionary a definition for the term ***site work***, by referring to the definition the Bill inserts into the Building Act, section 7A, (Meaning of *site work*).

Paragraph 29 (1) (f) also carries an example of what plans must show to help explain how certain plans must show certain things, ***site work***, that are not necessarily ***building work***.

Paragraph 29 (1) (f) also carries a note, note 1, to draw attention to the fact that the Building Act (as amended by the Bill), **section 30, (When building approvals not be issued—general),** and section **30A, (When building approvals not be issued—advice on referral),** prevent building approval being given in some cases. Section 30 in effect prohibits the issue of a building approval where carrying out the site work shown in the plans containing the building approval would contravene a Territory law. That is also why new paragraph 29 (1) (f) requires the information it mentions to be shown on plans—so the certifier can determine if carrying out any of the site work shown in the plans would contravene any Territory law, including the Building Act or *Planning and Development Act 2007*.

Paragraph 29 (1) (f) also carries a note, note 2, which explains that an example is not a part of the Building Act, is not exhaustive and may extend, but does not limit, the meaning of the provision in which it appears. The note also refers to the Legislation Act, sections 126 and 132 for further information about the operation of examples drafted into legislation.

It is important that certain plans show all relevant proposed site work so as the certifier can determine if the amount of open space on the land parcel, that has no physical development in respect of it, is of sufficient dimensions to meet the open space requirements of the *Planning and Development Act 2007,* which may be in a subordinate instrument under that Act such as the territory plan or a development code.

Clause [1.23] substitutes in the Building Act **section 30, (External design, siting and building material considerations),** with new **section 30, (When building approvals not to be issued—general)** and section **30A, (When building approvals not to be issued—advice on referral).** It also substitutes **section 31, (Application for amendment of approved plans),** with a recast version—**section 31, (Application for approval of amended plans).**

Section 30, (When building approvals not to be issued—general), as substituted by the Bill, prohibits a certifier from issuing a building approval if a circumstance listed in the provision applies. New section 30 covers the same requirements as the unamended section 30 it substitutes for but with the following variations—

the unamended provision did not list the "proposed use of the building as determined by the class of the building" as a criteria, whereas new section 30 (1) (d) does; and

the unamended provision did not list the "number of buildings on the land" as a criteria, whereas new section 30 (1) (e) does; and

the unamended provision applied only to the external design of a building whereas the new provision does not relate only to the external design features but rather applies to all design features covered by the definition of the term ***design*** under section 30 (3); and

new section 30 also carries an example to help explain its effect, whereas the unamended provision did not; and

new subsection 30 (2) permits a regulation to prescribe when a building approval must no be issued, apart from the prohibitions provide in section 30, whereas the unamended section 30 did not. That anticipates that over time other circumstances may arise that may justify prohibiting the issue of a building approval, and permits a regulation to be made to prohibit the issue of the approval in the prescribed circumstances.

The amendments are necessary to help give effect to reforms under the *Planning and Development At 2006* that are anticipated to require certifiers to play a greater role in approving developments, which prior to the above-mentioned planning system reforms, required development approval under that Act but are anticipated to be exempt for that requirement if the development meets technical requirements of the terms of the exemption. Terms of the exemption are anticipated to cover matters such as building use and numbers of buildings on the land.

Section 30A, (When building approvals not to be issued—advice on referral), sets out a new set of criteria, which if satisfied also prohibits the certifier from issuing a building approval. The criteria relate to referral entity's advice on an application for building approval made under the Building Act, **section 26, (Building approval applications)**. The Building Act (as amended by the Bill), **section 27, (Certifier not to consider certain applications)**, requires a referral entity's advice to be sought on an application of a regulation requires the advice to be sought. See notes above in relation to section 27 (1) (b) for further explanation about the role of referral entities.

An intended effect of section 30A is to prohibit the certifier from issuing a building approval for plans if—

> a regulation requires the advice of an entity to be sought on the application. For example, prior to the amendments in the Bill having effect the Building Act required consultations, consents or approvals on applications, by referral entities such as the ACT Fire Brigade and utility services operators, so as they could advise on fire safety and utility services asset protection, respectively, for example; and
>
> the entity's advice has been sought as prescribed by a regulation; and
>
> issuing the building approval or carrying out work in accordance with the approval would be inconsistent with the advice given pursuant to that regulation provision; and
>
> the referral entity has not—
>
> > withdrawn the advice; or
> >
> > changed or added to the advice so that issuing the approval or carrying out work in accordance with the approval would not be inconsistent with the advice as changed or added to; and
>
> the certifier is not satisfied on reasonable grounds that—
>
> > further information or amendments of the application address the advice of the entity; or
> >
> > the advice relates to an area other than an area that the entity giving the advice is authorised by regulation to give advice on.

Section 31, (Application for approval of amended plans), resolves an anomaly in the section 31 provision it substitutes for. The anomalous provision inferred that application could be made to a certifier for the certifier to amend plans containing a building approval. That was inconsistent with the Building Act's other provisions covering the process, which implied that the plans had to firstly be amended by the applicant and application then made application to the certifier for approval of the amended plans. The certifier is not entitled to

amend plans if doing so contravenes the 'conflict of interest' provisions provided for in Building Act, **section 23 (Entitlement to act as certifier)**.

Clause [1.24] amends the Building Act, subsections 32 (2) as a consequence of the amendments the Bill makes to **section 31, (Application for approval of amended plans).** The clause changes the phrase "plans as amended" to "amended plans".

Clause [1.25] substitutes in the Building Act paragraph 32 (2) (b). The substitute paragraph is the same as the unamended paragraph except it caters for amendments the Bill makes to the Act, reflected in new section **30 (When building approvals not to be issued—general).** The amendment is necessary as the unamended paragraph referred to unamended section 30, and so required consequential amendments to refer to the amended title of section 30 and to also refer to new section 30A, which the Bill inserted as part of amending section 30.

Clause [1.26] amends the Building Act, subsections 32 (3) as a consequence of the amendments the Bill makes to **section 31, (Application for approval of amended plans).** The clause changes the phrase "plans as amended" to "amended plans".

Clause [1.27] inserts into the Building Act, sections 32A, 32B and 32C.

Section 32A, (Certifier may require further information—application for approved plans amendment), entitles the certifier for building work to ask an applicant for approved plans amendment to give the certifier stated further information in relation to the application if the certifier believes on reasonable grounds that the information will help the certifier to decide the application without personally inspecting the land where the building work is to be carried out. Subsection 32A (1) sets out prerequisite criteria, all of which must apply before section 32A applies.

It is necessary to provide the section 32A power to certifiers to assist applicants to gather the required documents or information to save on the certifier's costs of inspecting the site of the proposed work for example. However paragraph 32A (1) (c) provides that the power does not apply where the applicant has agreed with the certifier that the certifier will obtain the further information.

Section 32A (3) lists certain matters that the section 32A power does not extend to, but is not a list of all such matters.

Section 32B, (Contents of request for further information), sets out the information that requests under section 32A must state, as well as the timeframes that the request must indicate apply. Section 32B (2) entitles the request to require the applicant for approved plans amendment to verify by statutory declaration under the *Statutory Declarations Act 1959* (Commonwealth), all or part of the information that the request covers. That is intended to provide certifiers with a tool to dissuade the provision of false or misleading information.

Section 32C, (Effect of failure to provide further information—applications for building approval), entitles a building certifier to refuse to approve a proposal to approved amended plans, and refuse to amend a building approval, under the Building Act, section 32, if section 32C (1) applies. Section 32C (1) sets out criteria that make section 32C apply—

> a certifier has asked for further information under section 32A in relation to an application; and
>
> the applicant has not provided some or all of the information in accordance with the request; and

the applicant and the certifier have not agreed that the certifier will obtain the further information.

The section 32C power to refuse to approve a proposed amendment to approved plans and to refuse to amend a building approval is necessary so that the certifier can close off applications that have failed to be accompanied with, or supported by, the information that the certifier reasonably needs to decide the application. Nothing in the Building Act or Bill is intended to prevent—

anyone from giving such information to the certifier to avoid the certifier refusing the application, prior to the certifier refusing the application; or

the certifier revoking such a refusal and approving the proposed amendment to approved plans and amending the building approval, provided the requirements for the approval and amendment are satisfied and the certifier is entitled to approve the proposed amendment and to amend the building approval; or

the certifier personally procuring the information despite a section 32A notice requiring someone else to procure it.

It is intended that the section 32C power to refuse to issue a building approval be exercised at the certifier's discretion, and nothing in the Bill or Act is intended to compel the certifier to exercise that power.

Clause [1.28] amends the Building Act, subsections 33 (1) as a consequence of the amendments the Bill makes to **section 31, (Application for approval of amended plans).** The clause changes the phrase "plans as amended" to "amended plans".

Clause [1.29] substitutes in the Building Act paragraph 33 (1) (b). The substitute paragraph is the same as the unamended paragraph except the new provision—

mentions "the certifier's licence number" whereas the unamended mentioned "his or her licence number". That is to cater for the fact that a certifier can be an individual, corporation or partnership, so the term "his or her" is not an appropriate descriptor of a certifier that is a corporation or partnership; and

requires each marking to include the date it is marked, which was not a requirement of the unamended provision. That is to help determine the length of time the building approval is in force and who made what approval-related markings on which plans and when.

In the case of a certifier being a corporation of partnership, where section 33 (2) (b) requires the certifier to mark its licence number and to initial the marking, it is intended that—

the initials be hand-signed, or a copy of the hand-signed initials marked by the person who made the original, for the added deterrence against fraudulent markings that provides; and

for the initials to be of the person who the corporation or partnership authorises to mark their initials for the corporation or partnership for the Building Act, section 33, consistent with laws in force in the Territory, including the Building Act and the provisions in the *Construction Occupations (Licensing) Act 2004* ("COLA") about nominees for corporations or partnerships licensed under COLA.

Clause [1.30] substitutes in the Building Act paragraph 33 (2). The substitute paragraph clarifies the situation where plans are too numerous to have the amended building approval marked or attached to each page.

The new provision requires each marking to include the date it is marked, which was not a requirement of the unamended provision. That is to help determine the length of time the amended building approval is in force and who made what amended approval-related markings on which plans and when.

Clause [1.31] substitutes in the Building Act all of section 35. The unamended provision was entitled "Land to be used in accordance with lease", whereas the new section is entitled "Land to be used in accordance with lease and development approval". The new provision contains paragraphs 35 (c) and (d) which were not part of the unamended provision. Otherwise the unamended and substituted provisions are the same, apart from the title change.

Paragraphs 35 (c) and (d) widen section 35 so as it clarifies that a building approval under the Building Act, section 28 does not authorise development on land that is contrary to development approval requirements of the *Planning and Development Act 2007*.

Clause [1.32] substitutes in the Building Act section 36 (1) (b), in effect amending the provision to clarify that it only applies to a development period if such a period applies to the relevant building work. That is to cater for circumstances where building work has a building approval but is exempted from requiring a development approval under the *Planning and Development Act 2007*.

Clause [1.33] inserts into the Building Act, section 36 (3A) to clarify that a building approval, or part of the building approval, does not operate while the approval or part is suspended. That compliments new section 53 (2A), which the Bill inserts into the Building Act, which suspends a building approval, or part of it, if a stop notice is issued for the building work, or part of it, under the Building Act, section 53 (Stop notices).

See notes below on new section 53 (2A) for further explanation of the need for and intend of such suspensions.

Clause [1.34] inserts into the Building Act section 36A.

Section 36A, (Requirement to give advice in relation to proposed building work), is intended help establish a new system regulating the referral of building plans to entities for advice. The system relies on a regulation prescribing the relevant entities that need to have plans for building approval circulated to them for advice under the Building Act, section 27 (1) (b). It is proposed that that system will mirror the similar system provided in the Planning and Development Bill 2006, as far as it is reasonably practical to do so.

The overall effect of section 36A is to bind referral entities to advice that they give under the referral system, by prohibiting entities from acting inconsistently with the advice that they have given under the system, except as permitted by the section. Section 36A describes the behaviour of such an entity, that is taken as amounting to the entity ***acting inconsistently*** with the advice, and carries an example of that advice and an example of acting inconsistently with that advice to help illustrate the effect of the provision.

A summary example of the effect of section 36 is as follows—

> if a sewerage network utility operator is required to provide advice under the Building Act, section 27 (1) (b), and gives that advice under that section, then section 36A is intended to prevent the operator from acting inconsistently with that advice, except as

permitted by section 36A. For example if the advice was to the effect that the operator approved that the location of all buried sewage assets on the relevant land where accurately shown in the plan and that the operator approved the proposal to build a house shown in the subject plans, then it is intended that the operator be prevented from doing something in a way that prevents the house being built to the plan, unless section 36A provides otherwise.

Section 36A is necessary to prevent circumstances arising where a referral entity indicates in writing that it approves of proposed construction, but subsequently invokes provisions in law, particularly under laws regulating utilities, to require demolition or alteration of the construction on grounds that the location of the construction, for example, contravenes the law. However, it also provides appropriate protections for the referral entity by catering for circumstances where certain new information comes to light after the advice is given.

Clause [1.35] substitutes in the Building Act section 42 (1) (e) to clarify that the intention of both the unamended and substitute provision was and is to require building work to only be carried out by, or under the supervision of, the builder mentioned in the commencement notice and under the authority of a builder's licence that authorised doing the work. That is to ensure that if a builders licence expires, is suspended, cancelled or has its authority modified in some other way after the licence was assessed in relation to an application for the commencement notice, the holder of the licence can no longer be the licensee in charge of carrying out the building work mentioned in the commencement notice if the licence no longer authorises that work.

Clause [1.36] substitutes in the Building Act section 43 and section 44 to recast them.

Section 43, (Stages of building work), as recast, differs in effect from the unamended provision in that the new provision enables a regulation to prescribe circumstances when building work may progress beyond a prescribed stage, certain exemptions that apply to such work, and how work may proceed beyond the stage, whereas the unamended provisions did not.

That is necessary to resolve situations where building work unlawfully proceeds passed a mandatory inspection stage without the permission or inspection required by subsection 43 (3). It is envisaged that a regulation will permit work to be done to facilitate the inspection, such as by undoing work that may have covered over parts of the building's structure that required inspection. An intended outcome is that the provision will be able to be relied upon in certain circumstances to resolve such matters, thus permitting the building to be certified as complying with the Building Act despite initially contravening inspection stage requirements. Without the amendment to the provision, such a building may not be able to be certified and might thereby not be eligible for the issue of a certificate permitting occupancy or use of the building. Section 43 carries a detailed example of its effect in combination with a possible regulation. The regulation provisions mentioned in the example are hypothetical.

Section 44, (Stage inspections), as recast, differs in effect from the unamended provision in that the new provision requires the directions under that section to specify a reasonable date for achieving compliance with the directions. The directions are required to be given by the certifier to the licensee in charge of building work if the certifier finds on inspection under section 4 that building work does not comply with the relevant provisions of the Act.

Section 44 as recast also differs from the unamended provision in that at subsection 43 (5) requires a certifier to certify that building work complies with the Building Act, section 42 if the certifier has given section 42 (a) directions on how to make non-compliant building work

comply with requirements. That only applies if the certifier is satisfied on reasonable grounds that the work complies with the relevant provisions of the Act. The provision also requires the certifier to follow the relevant procedure for such a certification if that procedure is prescribed by regulation. It is anticipated such a procedure would require the certifier to reinspect the work prior to either certifying it as compliant or giving further directions about non-compliance detected.

An intended outcome is that the provision will be able to be relied upon in certain circumstances to resolve such matters, thus permitted the building to be certified as complying with the Building Act despite initially contravening inspection stage requirements. Without the amendment to the provision, such a building may not be able to be certified and might thereby not be eligible for the issue of a certificate permitting occupancy or use of the building.

Clause [1.37] substitutes in the Building Act paragraph 45 (1) (c) to make a consequential amendment to a cross-reference because of amendments to the subsection numbering in section 44 by the Bill.

Clause [1.38] substitutes in the Building Act subsection 48 (1) to clarify that it can apply where building work has not been carried out strictly in accordance with the relevant requirements of the Building Act, but has been carried out substantially in accordance with that Act. It also entitles a regulation to prescribe when work is or is not substantially in accordance with those requirements, whereas the unamended section 48 did not.

Clause [1.39] substitutes in the Building Act paragraphs 48 (2) (b) and 48 (2) (c) to make consequential amendments to cross-references because of amendments to the numbering of provisions in section 44 by the Bill.

Clause [1.40] substitutes in the Building Act paragraph 48 (2) (e) to allow a regulation to prescribe an alternative certificate to that which may be issued under that paragraph. That is necessary to cater for a process that is anticipated to be prescribed by regulation to permit a certificate of occupancy to be issued for building work that was not carried out strictly or substantially in accordance with the Building Act.

Without the amendment to the provision, such a building may not be able to be certified and might thereby not be eligible for the issue of a certificate permitting occupancy or use of the building.

Clause [1.41] substitutes in the Building Act paragraph 48 (2) (h) to cater for new paragraph 48 (2) (ha), which is a consequential change to give effect to new section 69 (2B). Section 48 (2) (ha) requires a certifier to provide written advice to the effect that section 69 (2B) applies to certain building work if the certifier is of that view.

Clause [1.42] substitutes in the Building Act all of section 50 with new sections 50, 50A, 50B and 50C. The unamended section 50, (Notification by certifier of contraventions of Act), required building certifiers to notify the ACT construction occupations registrar as soon as practicable of any contraventions of the Building Act that came to the certifier's attention. Unamended section 50(1) created a strict liability offence against a certifier that failed to comply with the notification requirement, except that unamended section 50 (2) described circumstances in which the offence and requirement to notify did not apply—

> it did not apply to building work only because the work did not comply with the Building Act, section 42, (Requirements for carrying out building work), if the building licensee in charge of the building work fixed the non-compliance matter to the satisfaction of the

certifier within a reasonable time after the day the matter was brought to the licensee's notice.

Section 50, (Notification by certifier of contraventions of building and development approvals—building work), as amended by the Bill, preserves the effect of the unamended section **50, (Notification by certifier of contraventions of Act),** but only in respect of building work that is not ***fundamentally non-compliant***, rather than in respect of any contravention of the Building Act. An intended effect is to not require certifiers to have a role in regulating all aspects of the Building Act, but rather to narrow the certifier's role to their functions under the Building Act that relate to the certifier and building work, and to also expand the function to cover notification of building work that does not comply with a development approval issued under the *Planning and Development Act 2007*.

New section 50 (4) allows a regulation to prescribe criteria for determining if work is ***fundamentally non-compliant*** or not. For work that is ***fundamentally non-compliant***, section 50, as amended by the Bill, requires the certifier to tell the registrar if building work in contravention of a building approval (issued under the Building Act, section 28) or in contravention of development approval issued under the *Planning and Development Act 2007*, chapter 7, comes to the certifier's attention.

Instead of the unamended provision making the offence not apply where the matter is fixed within a reasonable time of the matter being brought to the attention of the building licensee in charge of the building work, the amended provision does not allow for an unquantified "reasonable time", but instead indicates that the time to fix the matter is the reasonable time specified in writing by the certifier when the certifier brings the matter to the licensee's attention in writing.

As mentioned above, that provision, which disapplies the section 50 offence, does not apply, in the amended provision, to building work that is ***fundamentally non-compliant***. The intention is that building work that is fundamentally non-compliant must always be notified to the registrar when the fundamental non-compliance comes to the certifier's attention. Section 50 (3) (a) requires a notification of fundamentally non-compliant work to be given to the registrar not later than the end of the next working day after the day the fundamental non-compliance comes to the certifier's attention. The term business day is defined in the *Legislation Act 2001*, dictionary—

> ***working day*** means a day that is not—
>
> (a) a Saturday or Sunday; or
>
> (b) a public holiday in the ACT under the *Holidays Act 1958*.

That short timeframe for notifying under section 50 is to ensure that the registrar is able to exercise powers under the Building Act to stop or direct non-compliant building work at the earliest practical time, thereby reducing the amount of work that may have to be undone and redone properly to achieve compliance with the Building Act or the *Planning and Development Act 2007*.

The requirement to always notify fundamentally non-compliant work came about partly as a result of several circumstances—

a house was constructed in contravention of the respective building approval in that the approved plans showed a single storey house on land with insignificant cross-fall, whereas the land was in fact so steep that at the low end of the land the house was so tall that part of the area below its floor was high enough to construct an extra storey below the house's

normal storey. The house's construction was completed that way producing a 2-storey house when the building approval and development approval was only in respect of single storey house. Had the certifier notified the registrar of such gross non-compliance, the registrar may have been better able to prevent the non-compliance than the certifier, as the registrar has greater powers, under the Building Act, to regulate building work than those of certifiers; and

similarly, several residences in a multi-unit site were constructed with extra storeys in the form of attic rooms whereas the relevant approved plans and development approval did not show those extra storeys and did not show the building being as tall as they were constructed. The development was also the subject of laws that regulated the heritage aspects of the land and its environs, and the non-compliant attics and increased building height were inconsistent with the objectives of those laws.

Section 50 also carries an example to help illustrate its effect and a note to draw attention to the fact that under *Criminal Code* 2002, **section 58, (Physical elements),** the certifier has the evidentiary burden of establishing the matters mentioned in section 50 (3), which disapplies the offence established by section 50 (1).

Where section 50 requires the certifier to tell, it is not intended that the certifier must tell in writing, but the certifier may tell in writing (such as by a written—statement, letter, fax or email), or orally in person, or orally by telephone, for example. That is expected to make it easier and more expedient for certifiers to comply with section 50 than would be the case if section 50 required a formal notification in writing.

The Bill, clauses [1.83] and [1.95], insert provisions about how Government must handle being told of matters under the Building Act sections 50 and 50A.

Section 50A, (Notification by certifier of possible noncompliant site work), is a new requirement that certifiers must tell the ACT planning and land authority (which is established under the *Planning and Development Act 2007*, chapter 3) if the certifier suspects that—

site work, which is a term defined in the Building Act's dictionary as amended by the Bill, does not comply with, or is likely to produce a building that does not comply with, building plans approved under the Building Act, **section 28, (Issue of building approvals);** and

the ***site work*** is ***development*** requiring ***development approval***, which is a term defined in the Building Act's dictionary as amended by the Bill; and either—

there is no ***development approval*** for the ***site work***; or

if there is ***development approval*** in relation to ***the site work***—the ***site work*** has been done, or is likely to be done, in a way that will not comply with, or is likely to produce a result that will not comply with, the ***development approval***.

The requirement to tell only applies if the certifier is the certifier for the relevant ***building work***, which is a term defined in the Building Act, section 6, (Meaning of *building work*), on the land where the ***site work*** has been carried out. So, for example, if the certifier is appointed as certifier for a particular land parcel, and notices non-compliance on a neighbouring land parcel for which no certifier is appointed, the provision does not require the certifier to tell about the non-compliance unless the certifier is appointed certifier for that neighbouring land parcel.

Under the Building Act, **section 44, (Stage inspections),** if the certifier finds non-compliant building work during a mandatory inspection under section 44, the certifier is required to give directions to the licensee in charge of the work, on how to achieve compliance. Section 50A (2) clarifies that the section 50 requirement to tell applies whether or not such a direction under section 44 has been given to the license in relation to the matter that the certifier must tell about. The requirement to tell is intended to apply even if the matter has been fixed, to assist the ACT planning and land authority in its role of administering the *Planning and Development Act 2007*. That Act establishes offences for undertaking development without a required development approval or in contravention of the terms of such an approval.

The section 50A requirement to tell is a new function for certifiers. Historically there has not been a mechanism in law that provides for systematic inspection of development of land, other than development that is ***building work***. Section 50 (3) clarifies that section 50 does not endeavour to require certifiers to inspect or investigate site work matters that are not building work, as nothing in the Bill is intended to create a regulatory regime for systematic inspection of site work that is not building work.

However, the intent of section 50A is to require certifiers to share with the ACT planning and land authority suspicion(s) that the certifier reasonably forms about non-compliant ***site work*** that is not ***building work***, so that that authority can investigate the matter as it sees fit in its role as development regulator under the *Planning and Development Act 2007*.

It is not intended that section 50A inherently provide for a sanction for its breach, but its compliance is expected to be effectively regulated through licence disciplinary action provisions under the *Construction Occupations (Licensing) Act 2004*, ("COLA") **section 54, (Disciplinary grounds),** which makes any contravention of the Building Act a licence disciplinary grounds under COLA.

Where section 50A requires the certifier to tell, it is not intended that the certifier must tell in writing, but the certifier may tell in writing (such as by a written—statement, letter, fax or email), or orally in person, or orally by telephone, for example. That is expected to make it easier and more expedient for certifiers to comply with section 50A than would be the case if section 50A required a formal notification in writing.

The Bill, clauses [1.83] and [1.95], insert provisions about how Government must handle being told of matters under the Building Act, sections 50 or 50A. Consequently, section 50A carries a note drawing attention to the fact that a notice of a suspicion of noncompliant site work given under section 50A is taken to be a complaint made under the *Planning and Development Act 2007*, s 333.

Section 50B, (Site work without adequate development approval—people), creates 2 new strict liability offences.

The **section 50B (1)** offence lies against a certifier who is a person, if the certifier either—

issues a building approval under the Building Act, section 28; or

amends a building approval or approves amended plans under section 32;

and if—

the site work proposed in the approved plans or the approved plans as amended requires ***development approval*** (the term ***development approval*** is defined in the Building Act's dictionary, as amended by the Bill); and

when the approval is issued or the plans are amended, there is no development approval for the site work if carried out in accordance with the plans.

Section 50B (1) carries an example to illustrate its effect, and in particular how a building work project, such as a house, that has a development approval, only has a development approval for the erection of the house that accords to the plans in the approval. That is to say that if construction of the house deviates from those plans, the non-compliant house is not covered by the development approval.

A development approval sets out, in the plans bearing the development approval, how the building work must be carried out in order to comply with the approval. Varying from the plans may contravene the development approval and therefore the contravening work is not covered by the development approval and thereby the contravening work might be work for which there is no required development approval.

The section 50B (1) offence does not only extend to ***building work*** shown in approved plans or amended approved plans, but also extends to ***site work*** shown in those plans. For example if approved plans show a proposed driveway for a house, unless the driveway is exempt from requiring a development approval, the driveway shown in the plans may form part of the grounds for a section 50B (1) offence, despite the fact that the driveway is not covered by the definition of ***building work*** in the Building Act.

Section 50B (3) sets out a defence to prosecution for an offence under subsection 50B (1). The defence has 2 elements and both must be satisfied for the defence to apply—the defendant proves that the defendant—

(a) took all reasonable steps to find out whether the site work, if carried out in accordance with the approved plans, required development approval; and

(b) was satisfied on reasonable grounds that the development did not require development approval.

The section 50B (2) offence lies against a certifier who is a person, if the certifier, in resect of defective plans—

issues a building approval under the Building Act, section 28; or

amends a building approval or approves amended plans under section 32.

Section 50B (b) describes the criteria that make plans defective—the plans—

contain information that is false or inaccurate in a material respect; or

omit information required by the Building Act to be shown in the plans.

Section 50B (1) (c) provides that the section 50B offence only applies in circumstances where if the plans where not defective the certifier would have contravened subsection 50B (1).

Section 50B (4) sets out a defence to prosecution for an offence under subsection 50B (2). The defence has 2 elements and both must be satisfied for the defence to apply—the defendant proves that the defendant—

(a) took all reasonable steps to find out if the approved plans were defective; and

(b) was satisfied on reasonable ground that the plans were not defective.

Section 50B (5) clarifies that if a building approval indicates that something is not to have work done in relation to it, or is not part of the building approval, the certifier does not

commit an offence under that section in relation to the thing. That is necessary to cater for the fact that plans often show how proposed work interacts with work already executed or possible future work. It is intended that where section 50B (5) mentions "indicates something is not to have work done in relation to it, or is not part of the building approval" that applies if the indication is either implicit or explicit.

For example plans may be for a large shopping mall development that is to be executed in 10 stages. If the plans indicate they are for stage 2, the fact that plans also show, in addition to stage 2, stage 1 and stages 3 to 10, the plans could be taken to implicitly indicate that the plans are not for work to be done in relation to stages 1 and 3 to 10.

Section 50C, (Site work without adequate development approval—partners), creates 2 new strict liability offences.

The **section 50C (1)** offence lies against each partner of a partnership that is a certifier, if the certifier undertakes behaviour which in effect is of the same kind of behaviour as mentioned in the offence section 50B (1). See notes above about section 50B (1) for further explanation about the behaviour, the comparable offences and defence to prosecution for the offences.

The difference between the section 50B (1) offence and the section 50C (1) offence is that section 50B (1) is about the behaviour of a certifier who is a person, whereas the section 50C (1) offence is about the behaviour of a certifier who is a partnership.

Under the Legislation Act's definition of a ***person***, an individual and a corporation are both a person. However the definition implicitly excludes partnerships from that definition. So the sections 50B (1) and 50C (1) offences enable such offences to apply to behaviour by all certifiers, weather they be a person or a partnership.

The **section 50C (2)** offence lies against each partner of a partnership that is a certifier, if the certifier undertakes behaviour which in effect is of the same kind of behaviour as mentioned in the offence section 50B (2). See notes above about section 50B (2) for further explanation about the behaviour, the comparable offence and defence to prosecutions for the offence.

The difference between the section 50B (2) offence and the section 50C (2) offence is that section 50B (2) is about the behaviour of a certifier who is a person, whereas the section 50C (2) offence is about the behaviour of a certifier who is a partnership.

Under the Legislation Act's definition of a ***person***, an individual and a corporation are both a person. However the definition implicitly excludes partnerships from that definition. So the sections 50B (2) and 50C (2) offences enable such offences to apply to behaviour by all certifiers, weather they be a person or a partnership.

Section 50C (6) clarifies that if a building approval indicates that something is not to have work done in relation to it, or is not part of the building approval, the certifier does not commit an offence under this section in relation to the thing. That is necessary to cater for the fact that plans often show how proposed work interacts with work already executed or possible future work. It is intended that where section 50C (5) mentions "indicates something is not to have work done in relation to it, or is not part of the building approval" that applies if the indication is either clearly implicit or explicit. For example plans may be for a large shopping mall development that is to be executed in 10 stages. If the plans indicate they are for stage 2, the fact that plans also show, in addition to stage 2, stage 1 and stages 3 to 10, implicitly indicates that the plans are not for work to be done for stages 1 and 3 to 10.

Clause [1.43] inserts into the Building Act section 53 (1) (ba), which is a new grounds for issuing a *stop notice* under section 53 (2). Section 53 (1) lists several grounds, and the new

section 53 (1) (ba) ground is that building work is being, or is to be, carried out in accordance with a building approval that is, or part of which is, defective because it contains information that—

(i) is false, misleading or inaccurate in a material respect; or

(ii) conflicts with other information in the approval so that carrying out building work, or site work that materially affects the building work, in accordance with the approval or part—

(A) is not physically possible; or

(B) is unlikely to be physically possible without amending the building approval; or

(C) is likely to contravene this Act, another territory law or a condition of a consent that applies to the building work or a lease, licence, permit or other authority that applies to the land where the building work is being carried out.

An intention is to ensure that work can be prevented from being carried out in accordance with plans that are inappropriate for their purpose because they satisfy 1 or more of those grounds. The effect of a section 53 stop notice is to prohibit the carrying out of building work that is the subject of the notice. The Building Act, section 64, (Compliance with notices under pt 4), establishes offences for contravening a stop work notice under section 53.

Clause [1.44] substitutes in the Building Act section 53 (1) (e) and (f) to make amendments as a consequence of the repeal of the *Land (Planning and Environment) Act 1991* ("the Land Act") and its replacement by commencement of the *Planning and Development Act 2007*. The amendments in effect change superseded references to the Land Act so as they refer to the superseding provisions of the *Planning and Development Act 2007*.

Clause [1.45] inserts into the Building Act section 53 (2A), which provides to the effect that a stop notice under section 53 suspends the building approval, or the respective part thereof, that covers the building work that is the subject of the stop notice. That is necessary to overcome any perception that may arise that the operation of a building approval estops the power to issue a stop notice. It is intended that the operation of a building approval must not prevent the issue of a stop notice, unless the stop notice was issued or to be issued on grounds relating to the absence of a building approval and the subsequent issue of the building approval therefore ends the stop notice or overcomes the grounds for issuing the stop notice.

Examples of the intended operation of section 53 (2A) are as follows—

Approved plans show a single storey house. A second storey attic is being erected in the house. The attic parts are therefore not in accordance with the approved plans for the house and therefore represent grounds under the Building Act, section 53 (1) (b) for a stop notice prohibiting further work either on the attic or on the whole house, for example, as the house is not being constructed as a single storey house. If the stop notice is issued in respect of the whole house, the effect of section 53 (2A) is to suspend the building approval for the whole house.

If a building approval is subsequently obtained for the house including the second storey attic, consistent with how the house has been so-far constructed; under section 53 (3) the stop notice ends because the grounds for the notice (not building in accordance with a building approval) no longer exists. The end of the stop notice ends the suspension of the first-mentioned building approval, except if that building approval ended earlier, the

suspension ended when the building approval ended rather than by the stop notice ending the suspension.

Clause [1.46] substitutes in the Building Act section 53 (3) (a) to cater for the term ***entity*** instead of ***person***, for same reasons set out above for clause [1.9].

Clause [1.47] substitutes in the Building Act section 53 (4) to amend its references to paragraphs in section 53 (1) as a consequence of the above-mentioned insertion of section 53 (1) (ba). Prior to the amendment section 53 (4) referred to "subsection (1) (a) or (b)", and the amended section 53 (4) instead refers to "subsection (1) (a), (b) or (ba)".

Clause [1.48] substitutes in the Building Act the notes carried by section 54 (2) to draw attention to the fact that a stop notice under the Building Act, **section 53, (Stop notices),** suspends a building approval. It is intended that if work is permitted under a stop notice, as provided for in the Building Act, and if that work is required to only be done under a building approval, the suspended building approval does not authorise such work while it is suspended. To resolve such a situation a new building approval might be required. See notes above on section 53 (2A) for explanation about the operation of such suspensions.

Clause [1.49] inserts into the Building Act section 57 (4), which clarifies that the cancellation of a stop work notice issued under the Building Act, **section 53, (Stop notices),** ends the suspension of any building approval suspended because of the stop work notice. Section 57 deals with decisions on applications by entities other than relevant landowners for cancellation of stop notices.

Clause [1.50] substitutes in the Building Act sections 59 (b) and 59 (c) so as they cater not only for entities that are a ***person***, but also for entities that are a partnership, as certain licensees, including builders, licensed under the *Construction Occupations (Licensing) Act 2004* may be a person or a partnership. See notes above for clause [1.9] for further explanation of the term ***person***, and the need to cater for partnerships.

Clause [1.51] substitutes in the Building Act section 60 (2) so as it caters not only for entities that are a ***person***, but also for entities that are a partnership, as certain licensees, including builders, licensed under the *Construction Occupations (Licensing) Act 2004* may be a person or a partnership. See notes above for clause [1.9] for further explanation of the term ***person***, and the need to cater for partnerships.

Clause [1.52] substitutes in the Building Act sections 61 (e) and 61 (f) to make amendments as a consequence of the repeal of the *Land (Planning and Environment) Act 1992* ("the Land Act"), and to cater the Bill's insertion of a definition of the term ***development approval*** into the Building Act's dictionary.

The unamended provisions referred to 'development requiring approval under the Land Act, division 62' or 'development approved under the Land Act, division 62' whereas the substitute provisions refer to 'development requiring development approval' or development with development approval'. The inserted definition of the term ***development approval*** refers to ***development approval*** under the *Planning and Development Act 2007*, as the Bill inserts a definition to that effect into the Building Act's dictionary.

Clause [1.53] substitutes in the Building Act all of section 64 with a replacement section 64 that provides at section 64 (1) for the same strict liability offence provided for in the unamended section 64. It also provides a new strict liability offence at section 64 (2). The section 64 (1) offence relates to behaviour by a ***person***, whereas the section 64 (2) offence

relates to behaviour by a partnership. That is necessary as certain licensees, including builders, licensed under the *Construction Occupations (Licensing) Act 2004* may be a person or a partnership. See notes above for clause [1.9] for further explanation of the term ***person***, and the need to cater for partnerships.

Section 64 (4) provides a defence to a prosecution for an offence under section 64 (1) or 64 (2). The defence is the same as the unamended defence, except that the unamended defence only required the defendant to establish that the defendant paid a reasonable amount to have the work of the part 4 notice done by someone else who was licensed to do the work, whereas the Bill amends that requirement so as it requires the defendant to prove that the defendant paid a reasonable amount to have the work of the part 4 notice done by someone else who was licensed to do the work, and that the defendant believed on reasonable grounds that the person paid would do the work in the notice.

Section 64 (5) establishes a defence to a prosecution for an offence under section 64 (2), which lies against the partners of a partnership.

The section 64 offences both relate to contravention of notices under the Building Act, **part 4, (Stop and demolition notices).** Part 4 notices include notices under the Building Act—

section 53, (Stop notices), which have the effect of prohibiting doing stated building work; and

section 58, (Further notices relating to stop notices), which have the effect of requiring stated building work (including demolition) to be carried out to ensure that the building work for which a building approval was issued will be carried out in accordance with the approved plans and the provisions of the Building Act; and

section 60, (Notice to produce survey plan etc), which have the effect of requiring a person to give to the ACT construction occupations registrar (who is appointed under the *Construction Occupations (Licensing) Act 2004*) the plan or document mentioned in the Building Act, section 43 (2) (a). Those mentioned documents are a plan (a ***survey plan***) signed by a registered surveyor stating the position of a building in relation to the boundaries of a parcel of land where the building is to be erected and stating the level that the floor or floors of the building will have in relation to a level stated in the approved plans or another document prescribed under a regulation; or

section 62, (Notice to carry out building work), which have the effect of requiring person to carryout building work including demolition, on a ground mentioned in the Building Act, **section 61 (Preconditions for s 62 notice).** Those preconditions include grounds that relate to unlawfully constructed, unsafe or unhealthy buildings or buildings unfit for use.

Clause [1.54] substitutes in the Building Act section 65 (2) (b) which has the effect of omitting references to the term ***minor maintenance work***. Reasons for the omission are the same as set out above for clause 1.2.

Clause [1.55] substitutes in the Building Act section 66, and inserts new section 66A.

Section 66, (Meaning of prescribed requirements—div 5.1) differs from the section 66 it substitutes for in that it caters for the provisions that the Bill inserts into the Building Act, section 43 (1) (b), which deal with building work that has proceeded beyond a mandatory

inspection stage. See notes above on the Building Act, section 43, for further explanation of why certain work needs to be permitted to proceed beyond a mandatory stage.

Section 66A (prescribed requirements contraventions of s 43—div 5.1) clarifies that for the Building Act, **division 5.1, (Certificates of occupancy and other certificates)** building work is not taken not to comply with the requirements of the Building Act only because doing the work contravened that Act, **section 43 (Stages of building work),** if the work has been allowed to proceed beyond the stage where the contravention happened in accordance with a regulation under section 43 (1). See notes above on section 43 for further explanation of why work ought to be permitted to proceed past a mandatory inspection stage in certain circumstances.

Clause [1.56] inserts into the Building Act subsection 67 (2). The new subsection clarifies that **section 67, (Registrar may have regard to documents given)**, does not limit the matters that the ACT construction occupations registrar may have reasonable regard to when working out whether building work has been carried out in accordance with relevant requirements of the Building Act under division 5.1 (Certificates of occupancy and other certificates).

Clause [1.57] omits from the Building Act, **section 68, (Effects of certificates under div 5.1)**, the word "relating" and substitutes the phrase "in relation". The intent is make the language more consistent with the other mention of the phrase "in relation" in that section.

Clause [1.58] inserts into the Building Act new sections 69 (2A), 69 (2B) and 69 (2C), which cater for the issue of a certificate of occupancy or use for a building in circumstances not catered for elsewhere in the Building Act. The Building Act, **section 76, (Occupancy and use of buildings)** creates an offence if a person occupies or uses a building if a certificate of occupancy or use has not been issued under part 5 for a building.

The Building Act, section 69 (1) caters for the issue of a certificate of occupancy and use where building work involving the erection or alteration of a building has been completed in accordance with the prescribed requirements for the building work.

The Building Act, section 69 (2) caters for the issue of a certificate of occupancy and use where building work involving the erection or alteration of a building as completed is not strictly in accordance with the prescribed requirements for the building work but is substantially in accordance with the requirements.

The new sections 69 (2A) and 69 (2B) cater for the issue of a certificate of occupancy and use where building work involving the erection or alteration of a building has not been completed in accordance with the prescribed requirements for the building work. However, new section 69 (2B) prevents the certificate from being issued unless the ACT Construction Occupations Registrar, who is appointed under the *Construction Occupations (Licensing) Act 2004*, is satisfied that the applicant for the certificate has completed the certification process prescribed by regulation. It is intended that that prescribed process will only permit the certificate to be issued where the building work has produced a ***tenable*** building, where ***tenable*** means it is safe and health to occupy for its intended purpose.

New section 69 (2C) requires stated caveats to be written on section 69 (2B) certificates to warn about some of the implications of the certificate applying to building work that may have not be carried out in accordance with relevant requirements of the Building Act.

Clause [1.59] makes a consequential amendment to the Building Act, section 73 by omitting the mention of "Residential building" (singular) and substituting instead "Residential buildings" (plural).

Clause [1.60] inserts into the Building Act a new preamble to the definition for the term ***qualified licensed construction practitioner*** to replace the preamble to the definition under the Building Act, section 75 (4). The substitute provision mentions the term "entity" where the unamended provision mentioned the term "person". See notes above for clause [1.9] for further explanation of the term ***person***, and the need to cater for partnerships.

Clause [1.61] makes a consequential amendment to the Building Act, section 80 (3) by omitting the mention of "69 (1) or (3)" and substituting instead "69".

Section 80 (Copies of certificates of occupancy and regularisation) covers keeping, giving and replacing copies of certificates issued under the Building Act, **part 5, (Building occupancy).**

Clause [1.62] substitutes in the Building Act subsection 83 (2) (b), which has the effect of omitting references to the term ***minor maintenance work***. Reasons for the omission are the same as set out above for clause 1.2.

Clause [1.63] substitutes in the Building Act a new definition for the term ***builder*** to replace the definition under the Building Act, **section 84, (Definitions for pt 6).** The substitute provision mentions the term "entity" where the unamended provision mentioned the term "person".

That is necessary so as the definition encompasses not only entities that are a ***person,*** but also for entities that are a partnership, as only holders of a builder's licence can be named in a commencement notice, and certain licensees, including builders, licensed under the *Construction Occupations (Licensing) Act 2004* may be a person or a partnership. See notes above for clause [1.9] for further explanation of the term *person*, and the need to cater for partnerships.

Clause [1.64] substitutes in the Building Act the preamble to section 146 (2) (a) to make amendments as a consequence of the repeal of the *Land (Planning and Environment) Act 1992* ("the Land Act"), and to cater the Bill's insertion of a definition of the term ***development*** into the Building Act's dictionary.

The unamended provisions referred to 'a proposed building, or a building as proposed to be altered, forming part of a development within the meaning of the Land Act, division 6.2' whereas the substitute provisions refers to 'a proposed building, or a building as proposed to be altered, forming part of a development' or development with development approval'. The inserted definition of the term ***development*** refers to ***development*** under the *Planning and Development Act 2007*, section 7.

Clause [1.65] substitutes in the Building Act section 146 (3). The substitute provision mentions the term "entity" where the unamended provision mentioned the term "person". That is necessary so as the definition encompasses not only entities that are a ***person***, but also for entities that are a partnership, as certain licensees, including builders and building surveyors, licensed under the *Construction Occupations (Licensing) Act 2004*, may be a person or a partnership. See notes above for clause [1.9] for further explanation of the term ***person***, and the need to cater for partnerships.

Clause [1.66] inserts into the Building Act section 152 (1A) to clarify that the Building Act's section 152 provisions to entitle a regulation to prescribe certain things for the Building Act, extends to regulations that exempt a building from the application of the Building Act, or part of the Building Act, whether directly or by a further instrument, or conditionally or otherwise.

Clause [1.67] inserts into the Building Act section 152 (2) (c) to entitle a regulation to prescribe the advice that a referral entity may provide under the Building Act, section 27 (1) (b). It is anticipated that the regulation will confine the kinds of advice to matters that are the purview of the entity under a relevant law, and any related responsibilities, benefits and entitlements of the entity.

Clause [1.68] substitutes in the Building Act paragraph (a) of the Building Act's dictionary's definition for the term ***certifier***. See notes above for clause [1.9] for further explanation of the term *person,* and the need to cater for partnerships.

Clause [1.69] inserts into the Building Act's dictionary's a definition for the term ***development***, so as that term means the same as that term means in *Planning and Development Act 2007*, section 7. That is necessary as the Bill inserts various provisions that mention the term ***development***.

Clause [1.70] inserts into the Building Act's dictionary's a definition for the term ***development approval***, so as that term means the same as that term means in *Planning and Development Act 2007*, section 7. That is necessary as the Bill inserts various provisions that mention the term ***development approval***.

Clause [1.71] substitutes in the Building Act's dictionary the definition for the term ***eligible person*** with a definition for a new term, ***eligible entity.*** Although the substitute term is different to the unamended term, otherwise the meaning remains identical. The effect of the amendment is that the substitute provision mentions the term "entity" where the unamended provision mentioned the term "person". That is necessary so as the definition encompasses not only entities that are a ***person***, but also for entities that are a partnership, as certain licensees, including building surveyors, licensed under the *Construction Occupations (Licensing) Act 2004*, may be a person or a partnership. See notes above for clause [1.9] for further explanation of the term ***person***, and the need to cater for partnerships.

Clause [1.72] inserts into the Building Act's dictionary's a definition for the term ***information***, so as that term includes in its meaning "documents". That is necessary as the Bill inserts various provisions that mention the term ***information***, particularly in sections 26A, 26B and 26C, which cover the certifier's power to require an applicant for building approval under the Building Act, **section 26, (Building approval applications)**, to give the certifier further information. In that case the effect of the new definition is to empower the certifier to require further information including documents, as described in section 26.

Clause [1.73] inserts into the Building Act's dictionary's a definition for the term ***land*** to clarify its meaning. The definition relies upon the concept in law of land being the 3-dimensional space within the boundaries of the land (usually referenced to the earth's surface) and extending downward to a point at the earth's centre and projecting upward into space.

However, the definition also allows for land to be a space that is a subset of that concept, such as 3-dimensional cube of space in, on or above the earth's surface or combinations or 2 or more of those locations. That is to cater for circumstances for example where a part of a building may project horizontally below the ground, such as how a concrete footing could project out wider than a wall it supports, or how an awning projects out horizontally in space well above ground level, so people can walk beneath it.

The definition anticipates that a subset of land can include the space that is land that is bounded by the boundaries of a volume of space, including space under on or over the ground or 2 or more of those locations, defined in a—

permit granted under the *Roads and Public Places Act 1937*; or

licence under the *Planning and Development Act 2007,* part 9.11 (Licences for unleased land).

Clause [1.74] substitutes into the Building Act's dictionary's a definition for the term ***lease*** as a consequence of—

the repeal of the *Land (Planning and Environment) Act 1992* ("the Land Act"); and

commencement of the *Planning and Development Act 2007*.

That is necessary so as the term has the same meaning as it has under the *Planning and Development Act 2007,* section 227.

Clause [1.75] substitutes into the Building Act's dictionary's a definition for the term ***owner*** as a consequence of the repeal of—

the *Land (Planning and Environment) Act 1992* ("the Land Act"), and

commencement of the *Planning and Development Act 2007*.

That is necessary so as the term has the same meaning as it has under the *Planning and Development Act 2007*, section 227. The amendment also caters for the definition of the term ***land*** that the Bill inserts into the Building Act's dictionary.

An example of the intended effect of the definition, in conjunction with the new definition of the term ***land*** is as follows—

if the Building Act provides a landowner with an entitlement to do something if the land is the subject of permit under the *Roads and Public Places Act 1937*; and

the permit permits the permit holder to erect a permanent roof shelter structure on and over an alfresco dining area on a public footpath; then

the permit holder may exercise the entitlement, in respect of erecting the shelter, unilaterally without reference to any other owner of the land containing the footpath. That is because the permit acts as the footpath owner's consent to do all things necessary under the Building Act to erect the shelter in accordance with the permit.

Clause [1.76] inserts into the Building Act's dictionary's a definition for the term ***site work***, indicating that the details of the definition are set out in the Building Act, **section 7A (Meaning of *site work*).** See notes on clause [1.1] for further explanation of the term ***site work***.

Clause [1.77] substitutes in the Building Act's dictionary's a definition for the term ***stage*** to make a consequential amendment to the cross-reference mentioned in the definition because of numbering amendments in the Bill.

Part 1.2, (Building and Construction Industry Training Levy Act 1999)

Part 1.2 lists amendments to the *Building and Construction Industry Training Levy Act 1999*, which is an Act to establish a system to collect, manage and distribute revenue from a levy on construction projects to help fund construction industry training and for other purposes.

Clause [1.78] omits from the *Building and Construction Industry Training Levy Act 1999***, section 15, (Definitions—pt3)**, definition of exempt work, paragraph (c), a note which indicated that the *Building Regulation 2004*, section 5 prescribes *exempt buildings*. The omission is in anticipation that as part of the 'planning system reforms' the *Building Regulation 2004* will be replaced with a superseding regulation, making the note redundant.

Clause [1.79] substitutes in the *Building and Construction Industry Training Levy Act 1999*, **section 15, (Definitions—pt3),** definition of exempt work, paragraphs (d) to (f), to make minor consequential changes as a result of amendments to Building Act in the Bill. The changes are to achieve wording consistency and do not substantively alter the intended effect of section 15.

Part 1.3, (Construction Occupations (Licensing) Act 2004)

Part 1.3 lists amendments to the *Construction Occupations (Licensing) Act 2004*, which is an Act to regulate through licensing and related administrative process, certain construction occupations, and for other purposes.

Clause [1.80] inserts into the *Construction Occupations (Licensing) Act 2004* ("COLA") new section 34 (3), which is intended to remove any doubt that certain mentioned circumstances do not estop the ACT construction occupations registrar from making a rectification order under COLA, section 38, (Rectification orders). That is necessary to address an issue raised by a decision of the Supreme Court of the ACT ("Supreme Court"). The issues were raised in the judgment of his Honour, Chief Justice Higgins in the case of *ACT Construction Occupations Registrar v John Tokich* [2006] ACTSC 89 (13 September 2006).

In that judgment, the Supreme Court considered an application for leave to appeal pursuant to section 46 of the *Administrative Appeals Tribunal Act 1989* (ACT) from a decision of the ACT Administrative Appeals Tribunal.

That decision, in turn, was made on appeal from a decision of the ACT Construction Occupations Registrar (made by the appellant, who was also the Building Controller) and a Deputy Registrar exercising the Registrar's powers to take certain remedial construction action in respect of a residence in the ACT.

That decision had resulted, on 16 November 2004, in the issue of a "notice of rectification order" sent to Mr Tokich, a licensed builder (the respondent).

The order was in the following terms:

> *In accordance with section 38 of the Construction Occupations (Licensing) Act 2004 (the Licensing Act), I, hereby order you to take the stated action as described in schedule 1 to this order to rectify work done by you as licensed builder. This rectification work is to be finished by 31 March 2005.*

Schedule 1 to that order set out requirements to do work in relation storm water drainage.

The Supreme Court considered if the building controller was entitled to issue the rectification order. The Supreme Court held, at paragraph 44:

It was not open to the Building Controller to have assumed that there had been a breach of s 37 of the Building Act *1972. He was estopped from asserting such a breach so long as the Certificate of Compliance under that Act remained valid. No proceedings were taken to set aside the certificate. Indeed, given the change of ownership of the relevant portions of the land, it is unlikely that any such relief would have been granted.*

The intended effect of new section 34 (3) is to overcome any estoppel that is perceived to arise when such rectification orders are made in circumstances where the matters covered by the order are the subject of the kind of certificate mentioned in the above recited extract of paragraph 44 of the Supreme Court judgment.

Further, section 34 (3) intends to make it clear that no such estoppel should be perceived to arise because of any of the kinds of certificate, approval or endorsement mentioned in section 34 (3) apply to the matters covered by a rectification order. That is to say that the entitlement to issue rectifications orders operates while those kinds of certificate, approval or endorsement are in force. Examples of such approvals include a development approval under the *Planning and Development Act 2007* or a building approval under the Building Act.

It is necessary to make it clear that the estoppel should not be perceived as arising as it is impractical in many circumstances to withdraw those kinds of certificates, approvals or endorsements merely to allow a rectification order to have effect.

For example, take the case where the work that is the subject of a rectification order is defective concrete in some columns supporting part of a high-rise office building, and the nature of the defect is that the columns are currently structurally sound but in the long term corrosion of their steel reinforcement will render the building structurally unsound. If a certificate of occupancy and use for the building has been issued under the Building Act, part 5, then the same estoppel that the Supreme Court perceived to exist suggests that in order to issue the rectification order for the columns' rectification, that certificate would first have to be withdrawn.

However, under the Building Act, part 5, it is unlawful to occupy or use a building without a certificate under that part. In that case the currently sound building would be rendered unlawful to occupy or use merely to permit rectification of the building's defective but currently sound columns.

Instead, new section 34 (3) intends to make it clear that the rectification order requiring the defective columns to be rectified can be issued and enforced while the certificate of occupancy and use for the building continues in force.

Clause [1.81] inserts into the *Construction Occupations (Licensing) Act 2004* ("COLA") new section 36 (3), which is intended to remove any doubt that certain mentioned circumstances do not estop the ACT Construction Occupations Registrar from making a rectification order under the COLA, **section 38, (Rectification orders).** See the notes above for clause 1.61 for further explanation, as new section 34 (3) has the same broad intention as, and similar construction to, new section 36 (3).

Clause [1.82] inserts into the *Construction Occupations (Licensing) Act 2004* ("COLA") new section 117 (2), which provides that a notice of a contravention given under the *Building Act 2004*, **section 50, (Notification by certifier of contraventions of building and development approvals—building work),** is taken to be a complaint made under COLA, **section 117, (Who may complain?).** That is necessary to provide a statutory process for receiving and handling such notifications, including a process that permits no further action to be taken in

investigating the matters of the notification if the notification was made on frivolous or vexatious grounds, as provided for in COLA section 117.

Clause [1.83] substitutes *Construction Occupations (Licensing) Act 2004* ("COLA") section 118 (2), so as well as providing that the ACT construction occupations registrar may accept a complaint for consideration even if it does not comply with subsection 118 (1), it also provides that the registrar—

> must accept a complaint for consideration even if it does not comply with subsection 118 (1) if the complaint is notice given under the *Building Act 2004*, section 50 (Notification by certifier of contraventions of building and development approvals—building work).

That is necessary to ensure that the COLA, subsection 118 (1) requirement to put complaints in writing signed by the complainant is not applied to building certifiers under the *Building Act 2004* when under that Act, section 50, the certifier tells the registrar about non-compliant site work that the certifier has become aware of; but to instead encourage the certifier to report such incidents by telephone, without the undue delay that formal notification in writing would produce.

The new provision does not prevent the registrar from deciding to not act on such a notification if the certifier **—**

> does not verify that the certifier made the notification when asked by the registrar; or
>
> if the certifier does not provide sufficient information in, or sufficient further information when asked by the registrar, to enable the registrar to investigate the matters in the notification.

Clause [1.84] inserts into the *Construction Occupations (Licensing) Act 2004* ("COLA") new section 120 (4).

The new provision clarifies that COLA, **section 120, (Further information about complaints etc)**, applies to a notice of a contravention given under the *Building Act 2004*, **section 50, (Notification by certifier of contraventions of building and development approvals—building work)**, in that the notification is taken to be a complaint made under COLA, **section 117 (Who may complain?).** The Bill inserts section 117 (2), which makes such a notification that kind of complaint under COLA.

Section 120 (4) is necessary to help ensure that a certifier who notifies under the *Building Act 2004*, section 50, can be required under COLA, section 120, to provide further information to help deal with the matter, otherwise the ACT Construction Occupations Registrar need not deal with the matter.

Clause [1.85] inserts into the *Construction Occupations (Licensing) Act 2004* ("COLA") new section 122 (2), which clarifies that COLA, **section 122, (No further action)**, applies to a notice of a contravention given under the *Building Act 2004*, **section 50, (Notification by certifier of contraventions of building and development approvals—building work).** The Bill inserts section 117 (2), which makes such a notification a complaint under COLA.

Section 122 (2) is necessary to ensure that no further action need be taken if a notice given under the *Building Act 2004*, section 50, lacks substance or is frivolous, vexatious, or was not made honestly or has been adequately dealt with.

Clause [1.86] inserts into the *Construction Occupations (Licensing) Act 2004* ("COLA") new section 123 (1) (c), which requires the ACT construction occupations registrar to refer a complaint under COLA, **part 11, (Complaints),** to the ACT planning and land authority,

which is established under the *Planning and Development Act 2007*, if the complaint was a notice given under the *Building Act 2004*, **section 50, (Notification by certifier of contraventions of building and development approvals—building work).** However the provision provides that that referral requirement only applies if the registrar is satisfied the complaint should be referred to the planning and land authority.

That is necessary in case the complaint deals with ***site work*** matters that are not ***building work*** as the ACT planning and land authority has comprehensive powers to deal with unlawful site work whereas the registrar's powers are limited to ***site work*** that is also ***building work***. The terms ***site work*** and ***building work*** are defined in the *Building Act 2004* and are explained in part 1.1 of this explanatory statement.

Clause [1.87] inserts into the *Construction Occupations (Licensing) Act 2004* ("COLA") new section 123 (3), which requires the ACT construction occupations registrar to give the ACT planning and land authority, which is established under the *Planning and Development Act 2007*, a copy of any complaint the registrar refers to the authority under **section 123, (Action after investigating complaint),** or a summary of the information provided in the complaint, and any information relating to the complaint that the registrar considers may be helpful to the authority, and a statement about why the registrar considers that the authority is more appropriate to deal with the complaint than the registrar.

The provision indicates that the requirement to provide those things only applies if the registrar refers a complaint to the ACT planning and land authority under COLA, section 123.

Part 1.4, (Construction Occupations (Licensing) Regulation 2004)

Part 1.4 lists amendments to the *Construction Occupations (Regulation) 2004*, which is regulation made under the *Construction Occupations (Licensing) Act 2004*, section **129, (Regulation making power).**

Clause [1.88] substitutes in the *Construction Occupations (Licensing) Regulation 2004*, **schedule 2, (Demerit disciplinary grounds), part 2.2, (Building surveyors licence demerit disciplinary grounds under Act, 54 (1) (a)), item 2.2.1, column 2, (demerit disciplinary ground)**, to make amendments to the item's cross-reference to the Building Act, as a consequence of changes to provision numbering in the Building Act by the Bill. It is intended that despite the amendment, the corresponding number of demerit points remains unchanged.

Clause [1.89] substitutes in the *Construction Occupations (Licensing) Regulation 2004*, **schedule 2, (Demerit disciplinary grounds), part 2.2, (Building surveyors licence demerit disciplinary grounds under Act, 54 (1) (a)), item 2.2.3, column 2, (demerit disciplinary ground)**, to make amendments to the item's cross-reference to the Building Act, as a consequence of changes to provision numbering in the Building Act by the Bill. It is intended that despite the amendment, the corresponding number of demerit points remains unchanged.

Clause [1.90] substitutes in the *Construction Occupations (Licensing) Regulation 2004*, **schedule 2, (Demerit disciplinary grounds), part 2.2, (Building surveyors demerit disciplinary grounds under Act, 54 (1) (a)), item 2.2.7, column 2, (demerit disciplinary ground),** to make amendments to the item's cross-reference to the Building Act, as a consequence of changes to provision numbering in the Building Act by the Bill. It also adjusts wording to better correspond to the amended wording in the Building Act. It is intended that despite the amendment, the corresponding number of demerit points remains unchanged.

Clause [1.91] substitutes in the *Construction Occupations (Licensing) Regulation 2004*, **schedule 2, (Demerit disciplinary grounds), part 2.2, (Building surveyors licence demerit disciplinary grounds under Act, 54 (1) (a)), item 2.2.7, column 3, (short description)**, to make amendments to the item's cross-reference to the Building Act, as a consequence of changes to provision numbering in the Building Act by the Bill. It also adjusts wording to better correspond to the amended wording in the Building Act. It is intended that despite the amendment, the corresponding number of demerit points remains unchanged.

Clause [1.92] substitutes in the *Construction Occupations (Licensing) Regulation 2004*, **schedule 2, (Demerit disciplinary grounds), part 2.2, (Building surveyors demerit disciplinary grounds under Act, 54 (1) (a)), item 2.2.8, column 2, (demerit disciplinary ground),** to make amendments to the item's cross-reference to the Building Act, as a consequence of changes to numbering in the Building Act by the Bill. It also adjusts wording to better correspond to the amended wording in the Building Act. It is intended that despite the amendment, the corresponding number of demerit points remains unchanged.

Clause [1.93] substitutes in the *Construction Occupations (Licensing) Regulation 2004*, **schedule 2, (Demerit disciplinary grounds), part 2.2, (Building surveyors demerit disciplinary grounds under Act, 54 (1) (a)), item 2.2.9, column 2, (demerit disciplinary ground),** to make amendments to the disciplinary grounds as a consequence of changes to the corresponding grounds in the Building Act by the Bill. The grounds relate to failure to notify contraventions of a building approval or development approval under the Building Act, **section 50 (Notification by certifier of contraventions of building and development approvals—building work).** Although the Bill also inserted into the Building Act new **section 50A, (Notification by certifier of possible noncompliant site work),** it is not intended that the Bill create any disciplinary demerit point grounds that relate to new section 50A. It is intended that despite the amendment, the corresponding number of demerit points for contravention of the Building Act, section 50, remains unchanged.

Clause [1.94] substitutes in the *Construction Occupations (Licensing) Regulation 2004*, **schedule 2, (Demerit disciplinary grounds), part 2.2, (Building surveyors licence demerit disciplinary grounds under Act, 54 (1) (a)), item 2.2.9, column 3, (short description),** to make amendments to the description as a consequence of changes to the corresponding grounds in the Building Act by the Bill. The grounds relate to failure to notify contraventions of a building approval or development approval under the Building Act, **section 50 (Notification by certifier of contraventions of building and development approvals—building work).** It is intended that despite the amendment, the corresponding number of demerit points remains unchanged.

Part 1.5, (Planning and Development Act 2007)

Part 1.5 lists amendments to the *Planning and Development Act 2007*, which is anticipated to be result from the passing of the *Planning and Development Bill 2006*, which is to regulate certain planning and land matters including land and planning, use, and development on land.

Clause [1.95] inserts into the *Planning and Development Act 2007* new section 333 (2), which provides that a notice of a contravention given under the *Building Act 2004*, **section 50A, (Notification by certifier of possible noncompliant site work),** is taken to be a complaint made under the *Planning and Development Act 2007*, **section 333, (Who may complain?).** That is necessary to provide a statutory process for receiving and handling such notifications, including a process that permits no further action to be taken in investigating the matters of the notification if the notification was made on frivolous or vexatious grounds, as provided for in the *Planning and Development Act 2007*, section 333.

Section 333 (2) also provides that a complaint referred to the planning and land authority under the *Construction Occupations (Licensing) Act 2004*, **section 123, (Action after investigating complaint),** is also taken to be a complaint under the *Planning and Development Act 2007,* section 333. That is necessary to provide a statutory process for receiving and handling such referrals, including a process that permits no further action to be taken in investigating the matters of the notification if the notification was made on frivolous or vexatious grounds, as provided for in the *Planning and Development Act 2007,* section 333.

Clause [1.96] substitutes *Planning and Development Act 2007,* section 334 (2), so as well as providing that the ACT planning and land authority may accept a complaint for consideration even if it does not comply with subsection 334 (1), it also provides that the authority—

> must accept a complaint for consideration even if it does not comply with subsection 334 (1) if the complaint is notice given under the *Building Act 2004,* section 50A, (Notification by certifier of possible noncompliant site work).

That is necessary to ensure that the *Planning and Development Act 2007*, subsection 334 (1) requirement to put complaints in writing signed by the complainant is not applied to building certifiers under the *Building Act 2004* when they tell the authority about suspected non-complaint site work that they become aware of, but to instead encourage the certifier to report such incidents by telephone, without the undue delay that formal notification in writing would produce.

The new provision does not prevent the authority from deciding to not act on such a notification if the certifier **—**

> does not verify that the certifier made the notification when asked by the authority; or
>
> if the certifier does not provide sufficient information in, or sufficient further information when asked by the authority, to enable the authority to investigate the matters in the notification.

Clause [1.97] inserts into the *Planning and Development Act 2007* new section 336 (4), which clarifies that the *Planning and Development Act 2007,* **section 336, (Further information about complaints etc),** applies to a notice of a contravention given under the *Building Act 2004,* **section 50A (Notification by certifier of possible noncompliant site work)** in that the notification is taken to be a complaint made under the *Planning and Development Act 2007*, **section 333, (Who may complain?)**. The Bill inserts section 333 (2), which makes such a notification that kind of complaint under COLA.

Section 336 (4) is necessary to help ensure that a certifier who tells about a suspicion of non-compliance, under the *Building Act 2004*, section 50A, can be required under the *Planning and Development Act 2007,* section 336, to provide further information to help deal with the matter, otherwise the planning and land authority need not deal with the matter.

Clause [1.98] inserts into the *Planning and Development Act 2007* new section 339 (2), which clarifies that *Planning and Development Act 2007,* **section 339, (When authority satisfied no further action on complaint necessary)**, applies to a notice of a contravention given under the *Building Act 2004,* **section 50A, (Notification by certifier of possible noncompliant site work).** The Bill inserts section 333 (2), which makes such a notification that kind of complaint under COLA.

Section 339 (2) is necessary to ensure that no further action need be taken if a notice given under the *Building Act 2004*, section 50A, lacks substance or is frivolous, vexatious, or was not made honestly or has been adequately dealt with.