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THE LEGISLATIVE ASSEMBLY FOR THE AUSTRALIAN CAPITAL TERRITORY

CONSTRUCTION AND ENERGY EFFICIENCY LEGISLATION AMENDMENT BILL 2013 (NO 2)

EXPLANATORY STATEMENT

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CONSTRUCTION OCCUPATIONS AND ENERGY EFFICIENCY LEGISLATION AMENDMENT BILL 2013

Overview of the Bill

The Construction and Energy Efficiency Legislation Amendment Bill 2013 (No 2) (the Bill) amends a number of laws administered by the Environment and Sustainable Development Directorate.

The Bill is intended to refine the operation of a range of regulations applying to construction and related work in the Territory, and the Energy Efficiency Improvement Scheme. The Bill will also implement provisions and penalties that complement recommendations from a previous review of building quality and an ongoing review of the *Building Act 2004*.

The Construction and Energy Efficiency Legislation Amendment Bill 2013 amends the following laws:

- *Building Act 2004;*
- *Construction Occupations (Licensing) Act 2004;*
- *Construction Occupations (Licensing) Regulation 2004.*
- *Electricity Safety Act 1971;*
- *Electricity Safety Regulation 2001; and*
- *Energy Efficiency (Cost of Living) Improvement Act 2012.*

Building Act 2004

This Bill amends sections of the *Building Act 2004* to:

- clarify sections of the legislation relating to the completion of building work in response to comments made by Master Mossop of the Supreme Court of the ACT in his 19 July 2013 findings on Jan Ruckschloss v Craig Simmons & ANOR (No 2) [2013] ACTSC 133; and

- recast offences and revise maximum penalties for:
    - Section 42A, *Contravention of requirements for building work involving asbestos*,
    - Section 49, *Complying with building code*,
    - Section 51, *Carrying out building work in contravention of section 42*.

<u>Completion of building work</u>

Structural engineer's certificates

Section 47 provides for situations in which the certifier can require an owner of land to provide a certificate from a professional engineer about the structural sufficiency, soundness and stability of a building as constructed or altered.

Section 47 (1) provides that: A certifier may require the owner of a parcel of land where building work is being, or has been, carried out to give the certifier the certificates by professional engineers about the structural sufficiency, soundness and stability of the building as erected or altered for the purposes for which the building is to be occupied or used.

In Jan Ruckschloss v Craig Simmons & ANOR (No 2) [2013] ACTSC 133, Master Mossop noted that:

> "Section 47 (1) of the Act is somewhat difficult to understand in that it refers to "the certificates" as if "the" certificates were necessarily already in existence, which may well not be the case. I interpret it as giving a power to require an owner to provide certificates which may or may not predate the request from the certifier."

Master Mossop's interpretation reflects the intent of the provision. For some projects, particularly larger or complex projects, certification at certain stages of work from a suitably qualified engineer will be an inherent part of the project. For others, such as construction of small structures, a structural engineer's certificate will not be commissioned at certain stages unless the certifier requests a certificate. In addition, a certifier may request a new certificate if he or she is not satisfied a pre-existing certificate is valid or accurate.

This Bill amends section 47 (1) of the Building Act, with consequential amendments to sections 47 (2) and 47 (3), to clarify the intent of the provision that a certifier may request a new certificate (s) from the owner, rather than only pre-existing certificates.

Decisions on completion of building work

Section 48 prescribes the process a certifier must follow if building work subject to a building approval appears to be complete. In general where a judgement about the completion or adequacy of work is made under the section, it is made by the certifier. In a number of provisions in the Building Act, the legislation is clear that whether work has been completed, or completed in accordance with relevant legislation, is based on the view or the satisfaction of the certifier. For example 48 (1)(b), and sub paragraphs (a), (b), (d) and (j)-(m) under section 48 (3) specifically refer to the certifier.

Section 48 (1) provides that section 48 applies if "building work appears to be completed". In Jan Ruckschloss v Craig Simmons & ANOR (No 2) [2013] ACTSC 133, Master Mossop noted that:

> "There are some oddities in the drafting of s 48(1). Paragraph (b), which relates to whether or not the building is completed in accordance with the Act and the approved plans, is clearly based upon satisfaction of the certifier since it refers to the certifier being satisfied on reasonable grounds. Paragraph (a) would also appear to be based upon the opinion of the certifier since it refers to the building work "appearing" to be complete. Logically, given the obligations in s 48, it should be the appearance to the certifier which is relevant and hence the paragraph should probably be read as if it said "building work appears *to the certifier* to have been completed…".

The Bill amends section 48 (1) (a) to clarify that the section applies if the building work appears to the certifier to have been completed.

Section 48 (1) (c) includes a condition that must be true for section 48 to apply, being 'the building as erected or altered is structurally sufficient, sound and stable for the purposes for which it is to be occupied or used". Master Mossop noted that:

> "Paragraph (c) is more problematic. It is not expressly based on the opinion of the certifier. It does not say, for example, "*the certifier is of the opinion that* the building as erected or altered is structurally sufficient, sound and stable for the purposes for which it is to be occupied and used". Rather, its drafting would suggest that condition (c) is an objective fact which provides a precondition to the exercise of power under s 48(3). It is hard to see what utility there would be in making paragraph (c) a jurisdictional fact and, in my view, it would be more appropriate to read that paragraph as being based upon the certifiers opinion notwithstanding that such an interpretation fits awkwardly with the text of the section."

Under section 48 the certifier must consider whether the work has been completed in accordance with the Act and is fit for occupation – see s 48 (1) (b) and (3) (i), (j), (k) and (l). This will inherently include consideration of structural sufficiency to a level required by building regulation at the time the building was completed, and at the time of the certifier's assessment (to decide whether the building is fit for occupancy). Therefore, paragraph 48 (1) (c) is not required. This Bill omits s 48 (1) (c).

Construction Occupations (Licensing) Act 2004 and Construction Occupations (Licensing) Regulation 2004

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

- increase the maximum penalty under section 40 for intentionally failing to comply with a rectification order;
- allow for additional considerations as to when issuing a rectification order to an entity responsible for construction work is not appropriate; and
- amend section 56 to allow exercise of the Construction Occupations Registrar's (the Registrar) power concurrently with an application to ACAT for occupational discipline.

<u>Rectification orders</u>

Part 4 of the Construction Occupations (Licensing) Act provides for rectification orders and other obligations on licensees. Rectification orders work with the occupational discipline and demerit point systems, and provide an important and practical mechanism for correcting work that does not comply with minimum standards for health, safety, environment protection or amenity of occupants.

There are three main pathways for work to be rectified under Part 4:

- After issuing a notice of intention to make a rectification order (s34) the Registrar considers it is appropriate to make the order and issues an order to the entity given the notice (s38). Section 38 (2) allows for situations where it may be appropriate to issue a rectification order to the entity but that entity may not be licensed to complete some work or take stated action.

- After issuing a notice of intention to make a rectification order (s34) the Registrar considers it is not appropriate to issue an order to the entity that was given the notice, but that rectification work is required, so gives an authorisation another licensee to take relevant action or do the work stated in the notice (s37). It is not intended that the person who is given the original notice must be given a chance to rectify the work for this section to operate. This is because there may be reasons the person cannot return to the site, including that the relationship between the owner and the entity makes this inappropriate or that the person can no longer undertake or supervise the work.

- An emergency rectification order is given to a licensee or former licensee (s39). A notice under s34 is not required for an emergency rectification order.

Under section 37, the Registrar may only issue a rectification order to another party if he or she is satisfied it is not appropriate because of the because of the relationship between the entity and the land owner.

In giving a rectification order it is assumed that the Registrar should have confidence that the person can either carry out the stated action or arrange for required work to be carried out. However, although the Registrar can issue a rectification order to an entity and the entity must arrange for any work it is not qualified or otherwise authorised to do, the Registrar cannot consider whether the person could reasonably carry out or arrange the work when deciding to issue a rectification order. Issuing the order to a person that has already demonstrated substantial failures may result in further public health, safety and consumer protection risks.

The Bill amends section 37 to include whether the entity is not able to do a thing in the way that would be required by the rectification order. This could include a consideration of:

- The extent of the failings of the entity related to the rectification work; and
- The extent of the rectification work.

Issuing a rectification order is a reviewable decision. The entity that initially carried out the construction service could still seek a review of the decision to issue an order under section 37.

The Registrar would be able to apply these criteria to any potential order under consideration at the time of commencement. For fairness to licensees that have received a notice of an intention to make a rectification order prior to the new criteria commencing, but no rectification order or authorisation of another licensee has been made, the Registrar must give further written notice about the new reasons a rectification may not be issued to the initial licensee.

Occupational discipline

Under section 56 if the Registrar believes on reasonable grounds that a ground for occupational discipline exists in relation to a licensee, the Registrar may apply to the ACT Civil and Administrative Tribunal (ACAT) for an occupational discipline order in relation to the licensee; or take an alternative action to reprimand the licensee, require a person to complete a stated course of training, impose a condition on the licence, or amend an existing condition. The Registrar cannot take both actions.

In many cases it may be appropriate to take an action, such as condition a licence, while more serious discipline is being considered. Therefore, this Bill revises section 56 to clearly allow the Registrar to take an occupational discipline in conjunction with making an application to the ACAT for an occupational discipline order. The ACAT would be required to consider any action taken by the Registrar under section 56 when deciding on an application for an occupational discipline order. Disciplinary actions by the Registrar under section 56 will remain reviewable.

Electricity Safety Act 1971 and Electricity Safety Regulation 2004

The proposed amendments to the *Electricity Safety Act 1971 and Electricity Safety Regulation 2001* are to:

- reflect the transfer of certain product energy efficiency standards to the Commonwealth; and
- amend provisions related to directions to people under section 8.

This Bill also amends provisions relating to regulation-making powers under the Act.

Directions to rectify unsafe installations

Section 8 (2) of the Electricity Safety Act gives an inspector a power to give a person who has carried out unsafe wiring work relevant for subsection (1) (a) or (b) a written direction to take stated action to make the installation or work safe and compliant with Part 2 of that Act. Although the Act anticipates that only appropriately licensed people will carry out wiring work, and therefore should be able to legally carry out any direction to make the installation safe and compliant, this will not always be the case. A direction could be issued to a licensee that is not licensed, qualified or skilled to carry out the entire scope of works that forms the stated action for the order.

Certain qualifications may be required to undertake a stated action. For example, a licensed electrician may be directed to provide a written report on the compliance of a system that could only reasonably be prepared by an electrical engineer. Engineering is not licensable work but requires particular skills, knowledge and qualifications to undertake.

This Bill inserts provisions to clarify that where the entity is not licensed, qualified, authorised, or does not hold relevant skills or experience required to do something required to be done, that the entity must arrange and pay for the thing to be done.

It is expected that part of the work to make the installation or work safe and compliant will be to have work tested, certified or verified by a person that is qualified to do so. In some cases this may be by the licensee, but in other cases independent certification may be required. This Bill inserts a provision to clarify that a stated action for a rectification order may include a requirement for the entity to provide written information. This could include an independent report, certification or other information relating to the order, such as the results of a test that would normally need to be conducted on the work under section 6.

These provisions are consistent with similar provisions in section 38 of the Construction Occupations (Licensing) Act and section 22 and 32 of the *Water and Sewerage Act 2000*.

Minimum energy performance standards

Minimum energy performance standards and energy labelling for articles of electrical equipment sold in the ACT are made under section 27 of the Electricity Safety Act. The standards are based on requirements agreed by all states and territories under the national equipment energy efficiency (E3) program. The ACT adopted standards by corresponding law of the State of Victoria.

The primary responsibility for the national equipment energy efficiency standards has transferred to the Australian Government under the Commonwealth *Greenhouse and Energy Minimum Standards Act 2012* (the GEMS Act). The GEMS Act came into effect on 1 October 2012. New or revised greenhouse and energy minimum (GEMS) requirements, as agreed to by the relevant Ministerial Council and introduced by the Commonwealth Minister through determinations under the Commonwealth the GEMS Act, will be binding in all Australian jurisdictions.

However, section 9 of the GEMS Act (*Concurrent operation of State and Territory laws*) clearly states that the Act is not intended to exclude or limit the operation of a law of a State or Territory (the State or Territory law) to the extent that:

(a) the State or Territory law applies minimum requirements (however described) relating to greenhouse gas production or energy use in association with the supply and commercial use of a product that uses energy, or affects the energy used by another product; and
(b) if the product is a GEMS product (in a product class covered by a GEMS determination)—those requirements are more stringent than the corresponding requirements applying to the product class under the GEMS determination; and
(c) the State or Territory law is capable of operating concurrently with the GEMS Act.

Subject to the limitations in (a) – (c) the GEMS Act is also not intended to exclude or limit the concurrent operation of a State or Territory law if such a law makes an act or omission that is an offence against a provision of that Act, a similar act or omission, or an offence against the State or Territory law.

This applies even if the State or Territory law does any one or more of the following:

(a) provides for a penalty for the offence that differs from the penalty provided for in the GEMS Act;
(b) provides for a fault element in relation to the offence that differs from the fault elements applicable to the offence under the GEMS Act;
(c) provides for a defence in relation to the offence that differs from the defences applicable to the offence under the GEMS Act.

Legislation relating to the E3 program is intended to mean parts of Commonwealth, State and Territory Acts, regulations and other subordinate instruments that deal with GEMS requirements and matters related to the administration of GEMS requirements, to the extent they deal with matters related to GEMS requirements.

Concurrent laws can be made under section 27 of the Electricity Safety Act subject to the requirements of section 9 of the GEMS Act. Therefore, it is not proposed that all relevant sections of the Electricity Safety Act are repealed because the option remains for the Territory to regulate products for energy efficiency and associated labelling.

However, this Bill repeals regulations adopting Victorian equipment energy and labelling standards as a law in the ACT and revises relevant sections to reflect the transfer to the GEMS Act and clarify its interaction with Territory law. On the commencement of these provisions it is not expected that any jurisdiction-specific GEMS requirements will be made for the ACT.

Regulation-making power – adoption of instruments

New provisions applying to the regulation-making powers in the Act (new 66 (3) and 66 (4)) allow that a regulation may apply, adopt or incorporate the law of another jurisdiction or an instrument as in force from time to time. Further, if adopted, section 47 (5) or (6) of the Legislation Act does not apply in relation to the law of another jurisdiction or an instrument applied, adopted or incorporated under a regulation.

Section 47 (5) of the Legislation Act requires that if a law of another jurisdiction or an instrument is applied as in force at a particular time, the text of the law or instrument (as in force at that time) is taken to be a notifiable instrument made under the relevant instrument by the entity authorised or required to make the relevant instrument.

Section 47 (6) requires that if a law of another jurisdiction or an instrument is applied as in force from time to time, the text of each of the following is taken to be a notifiable instrument made under the relevant instrument by the entity authorised or required to make the relevant instrument:

(a) the law or instrument as in force at the time the relevant instrument is made;
(b) each subsequent amendment of the law or instrument;
(c) if the law or instrument is repealed and remade (with or without changes)—the law or instrument as remade and each subsequent amendment of the law or instrument;
(d) if a provision of the law or instrument is omitted and remade (with or without changes) in another law or instrument—the provision as remade and each subsequent amendment of the provision.

In considering whether the provisions, which may delegate relevant powers of the Legislative Assembly, are appropriate, it is useful to consider the context in which these provisions are proposed.

Adoption of documents in force from time to time

The Electricity Safety Act predominantly regulates work of a technical nature and requirements for electrical equipment usually included in Australian Standards and other technical documents. The vast majority of these technical documents are not prepared or owned by the Territory and it is expected that they will be subject to some form of copyright. Therefore, the Territory could not legally reproduce such documents. Although the Assembly may not have direct control over the contents of these documents as they exist from time to time, the Territory is generally involved in setting of standards for electrical work and electrical appliances at a national level.

It would be expected that any part of the rules involving the regulation of work and appliances would provide for evolving standards of work, materials and equipment as practices and performance requirements shift over time. This may be by applying or adopting an external technical document.

Adopting documents as in force from time to time means affected parties are aware that the document will be used on an ongoing basis and it is less likely that different documents will be used from one period to the next. If instruments cannot be adopted from time to time, a change, even a minor amendment, to any one of these documents would require a new instrument to be made. This is not only unwieldy but impractical as it would result in an extensive number of instruments each year.

The Executive is able to exercise discretion on whether it is appropriate to enforce a standard at a point in time or from time to time. If the nature of the standard means that ongoing adoption is desirable, say for a document that prescribes safe and competent installation practices, it is not an unreasonable extension of the existing powers of the Executive to allow the adoption of external documents from time to time. A new regulation can be made at any time if a new version of a standard is not appropriate, or a regulation can build in transition periods as part of a determination, as per the existing regulation for adoption of versions of Australian Standard 3000 (section 3 of the Electricity Safety Regulation). For practicality, it is considered that this would be done on a case-by-case basis.

Further, the Assembly may disallow regulations made under section 66 if it feels that the application, adoption or incorporation of a particular document is not appropriate. The control of the Assembly does not end once the regulation has been made. If a member of the Assembly is concerned about a new version of an instrument, the member may present their own regulation for consideration by the Assembly.

Taking the provisions as a whole, the Executive, and not whoever makes an adopted document remains responsible for the contents of the document as it relates to Territory law, including the ongoing use of external documents and ensuring their continuing relevance and appropriateness. In consideration of the above, the delegation of legislative power to adopt instruments from time to time is appropriate in this case.

Disapplication of subsection 47(5) and 47 (6) of the Legislation Act
If subsections 47 (5) and 47 (6) of the Legislation Act are disapplied, any applied document need not be notified on the Legislation Register. In making these provisions, there may be concern that if the content of a law or instrument applied, adopted or incorporated changes from time to time it may not be readily accessible, particularly where a provision does not create any alternative means for access.

The principle of access to law is important; however, any law must be practical and enforceable. Full access to law would require that the Territory could only use its own legislation and external documents that were not subject to copyright. Clearly this is not possible, especially for electrical and product standards.

The Legislation Act clearly contemplates that external laws and documents will play a role in ACT legislation and that there would be times that republication of adopted documents would not be possible. Section 47 was included in recognition of this. Further, section 164 provides for how Australian Standards are to be referenced in ACT legislation, indicating the expectation of relatively widespread adoption of such documents.

In relation to enforceability, if a document can't be published than it is not enforceable. Given that adoption of external documents is a vital part of electricity safety legislation, it would be unlikely that the Assembly would intend that instruments adopting Australian Standards and the like would be unenforceable. Therefore, concession has to be made that the documents need not be published.

It should be noted that due to the specialised nature of most technical documents, they are usually only accessed by practitioners that require them in the course of their work. Access from members of the public is rarely requested and the content of technical standards may be difficult to decipher even if it is.

In general, it is the practice to provide notes and other information in the text of the instrument or in explanatory information highlighting where adopted instruments can be found. Although in the vast majority of cases involving technical standards publication will not be possible due to copyright reasons, where publication is possible this is not precluded by the proposed provisions and will be standard practice. This practice need not be provided for in legislation.

Energy Efficiency (Cost of Living) Improvement Act 2012

The proposed amendments to the *Energy Efficiency (Cost of Living) Improvement Act 2012* are to augment the existing provisions for:

- reporting, calculating and achieving energy savings obligations to–
  - provide for a defined process for determination and payment of energy savings contributions for Tier 2 retailers; and
  - clarify when shortfall penalties are intended to apply; and
- treatment of unsafe things under the Act to incorporate installations that that may be unsafe due to the activities of a retailer under the Act.

The proposed amendments are to provide clear processes for retailers to follow when reporting annual compliance with the Act and a suitable regulatory framework for eligible activities.

This Bill also inserts a power for the Administrator to delegate his or her functions under the Act to a public servant, consistent with the powers of other statutory office holders.

Retailer Annual Compliance Reporting Requirements

Reporting requirements for entities that do not sell electricity in the ACT

At present, all retailers with an authorisation to sell electricity in the ACT (a NERL retailer for the purposes of the Act) must complete an annual compliance report under the Act including information on each of the items included under section 19 and any other information reasonably required by the Administrator (currently outlined in the *Energy Efficiency (Cost of Living) Improvement Record Keeping and Reporting Code of Practice 2013 (No 1)* (DI2013–265)).

There are over 40 retailers with an ACT authorisation, which includes a large number of retailers that have no sales in the ACT and therefore have a 'zero' energy savings obligation. It is unlikely that any of those retailers will undertake eligible activities in the ACT.

The code of practice provides requirements for a "nil return" for retailers i.e. that each of the relevant items in section 19 (1) (a)-(f) can be reported as zero but it cannot remove the requirement to report. Although it is important that all retailers are aware of the obligations under the Act if they start selling electricity in the ACT, a report from NERL retailers that have no electricity sales in the ACT and have not undertaken activities in a compliance period will not materially affect the operation of the Act.

Under section 19 (3), it is an offence for a retailer not to give the required information to the Administrator. The maximum penalty for the offence is 50 penalty points or $35,000 for a corporation. It is expected that a substantial proportion of retailers with a zero obligation will fail to report in accordance with section 19. The cost of pursuing a report confirming a retailer had no obligation and applying and enforcing penalties is high compared to the likely benefit of obtaining the report. Information on retailers that sold electricity in the ACT in a compliance period can be reconciled with other ACT and Australian Energy Regulator reporting obligations. Compliance action could then focus on enforcement against retailers that had an obligation to report but did not.

Annual reports for the first compliance period under the Act are due to the Administrator by 31 March 2013. Noting that a broader review of the Act and its operation will commence on 1 January 2014 it is not proposed at this stage to redefine a retailer under the Act to exclude those entities with no sales in the ACT.

Retailers with a zero obligation may still undertake activities and be involved in the acquisition of abatement factors under section 18. In subsequent compliance periods, retailers may also cease to operate in the ACT but have outstanding carried forward shortfalls or surpluses. So that retailers that have outstanding obligations or may participate in activities under the Act are still required to report, the revised reporting requirement would apply only to retailers that had a zero energy savings obligation and did not undertake eligible activities or acquire, or offer for acquisition (whether approved or not) any abatement factors in the relevant period, and do not have a carried forward surplus or shortfall.

This Bill amends section 19 to remove the requirement to report in the above circumstances.

Revising the process for determining and submitting energy savings contributions for Tier 2 retailers

Section 19 requires that NERL retailers must give the Administrator certain information relating to a compliance period not later than 3 months after the end of that compliance period. Tier 2 retailers may choose to comply with their energy savings obligation in full or in part by paying an energy savings contribution (ESC) as provided for under sections 11 and 14 (3) of the Act.

At present, section 19 (f) requires a Tier 2 retailer to report on the extent to which the retailer's energy savings obligation was achieved by paying an ESC. This implies a pre-payment of an ESC before reporting for the relevant compliance period has been lodged and the obligation for the period verified. This also means that an invoice or payment notice will not be issued. Payments of an ESC to the Territory may not be identified as payments for the Act.

In practice, to avoid under- or overpaying retailers are unlikely to pay an amount until they have a confirmation from the Administrator of what they should pay. If the retailer doesn't pay or doesn't pay enough, the existing provisions don't allow for an adjustment and invoicing of the outstanding amount, as it would be taken as a failure to meet the energy savings obligation and considered a shortfall, potentially attracting a shortfall penalty. This was not the intention of the provisions.

Retailers will require a reasonable time to determine their energy sales for the compliance period. For smaller retailers this is unlikely to be determined within a time that would allow notification of the ESC, issue of an invoice and payment of that invoice before reporting is due. Therefore, it is preferable for Tier 2 retailers acquitting all or part of their energy savings obligation by ESC to lodge their report as per the existing section 19 and for any ESC to be paid after the report is lodged.

The Bill creates a new process in the Act, similar to that in existing section 20, for retailers that have elected to achieve all or part of their obligation by paying an ESC. This would allow the Administrator to assess the retailer's obligation and notify the retailer of the ESC amount and the method of payment. The determination of the energy savings result under new section 20A and the minimum payment required to avoid a penalty are reviewable decisions.

The process outlined in section 20 would then apply only to Tier 1 retailers and Tier 2 retailers that were not electing to pay any of their obligation by an ESC.

The provisions are not expected to adversely affect the rights of any retailer. The regulations stipulate what happens if the retailer does not pay the ESC by the specified time on the notice. In effect this will be that the abatement that related to the ESC is then taken to be a shortfall that would attract penalties. The retailer will be given an opportunity to elect a carried forward shortfall up to the maximum permitted for the compliance period and the amount they will pay as a contribution.

This is consistent with the process for Tier 1 retailers and Tier 2 retailers that do not elect to pay an energy savings contribution.

It is not anticipated retailers would be granted additional time to pay as they should be monitoring their obligation. Additional time would be unequitable as other retailers not paying an ESC will need to reconcile their obligations by the time they report at the end of March each year.

Any subsequent penalty notice for failure to pay within the specified time period would not be reviewable because:

- the initial decision calculating the amount is reviewable;
- retailers electing to pay an ESC would have to acknowledge that they understand the consequences of failure to pay.

Therefore in each instance, the duty holder has the right to seek a review of the initial notice at the ACAT and is on explicit notice about the consequences of failing to comply. It is of fundamental importance that duty holders be required to comply with notices issued by those with the authority to do so under the Bill. The content and issuance of the notices, which are not issued by a court, are subject to legislative safeguards as well as administrative law principles at common law.

Regulatory Impact Analysis

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

This Bill amends the following subordinate laws:

- *Construction Occupations (Licensing) Regulation 2004*; and
- *Electricity Safety Regulation 2004*.

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

- the amendment to the *Construction Occupations (Licensing) Regulation 2004* (the Regulation) is a consequential amendment made as a result of revising section 56 in the Act. A decision to take a disciplinary action under section 56 is reviewable. Amendments to the Act split the three types of action the Registrar may take into separate subparagraphs. The amendment in the regulation corresponds to this change and allows for a review of any of the three actions consistent with the current rights of affected licensees. This does not adversely a person's existing rights;

- the amendments to the *Electricity Safety Regulation 2004:*
    - make technical amendments to correct references to relevant sections of the Electricity Safety Act; and
    - reflect the transfer of responsibility for the equipment energy efficiency standards to the Commonwealth under the *Greenhouse and Energy Minimum Standards Act 2012* (the GEMS Act).

Revised arrangements for equipment energy efficiency standards have been in place since 1 October 2012 and the Commonwealth law applies without requiring adoption of a corresponding law. All relevant standards under state and territory legislation, including the Victorian law adopted by the Territory, have been superseded by the Commonwealth GEMS Act. Therefore the amendments do not fundamentally affect the law's application or operation. In addition, the amendments are complementary with the legislation of the Commonwealth and an assessment of the costs and benefits of the new intergovernmental arrangements for equipment energy efficiency standards was undertaken before the GEMS Act was introduced.

The RIS for national legislation for minimum energy performance standards and energy labelling can be found at www.energyrating.gov.au/wp-content/uploads/Energy_Rating_Documents/Library/General/Regulation_/Decision-RIS-National-legislation-for-MEPS-and-energy-labelling.pdf

Further information about revised legislative arrangements is at: www.energyrating.gov.au/regulations/legislation/commencement-of-gems-legislation/

General impact of the Bill and amendments to primary legislation

The general impacts of the Bill are provided in the *Construction and Energy Efficiency Legislation Amendment Bill 2013 Regulatory Impact Statement*. There are no significant costs associated with the Bill and a number of provisions will provide a benefit as they streamline and clarify existing reporting requirements for certain electricity retailers.

The Government's Triple Bottom Line Assessment Framework requires an assessment of climate change impacts for government bills or for major policy proposals. Where there are no anticipated climate change impacts of a Government Bill or major policy proposal a statement must be included to that effect in the explanatory statement for the relevant Bill. The climate change impacts of this Bill have been considered and no impacts have been identified.

Offences and penalties

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

- Building Act Section 42A, *Contravention of requirements for building work involving asbestos*
- Building Act Section 49, *Complying with building code*
- Building Act Section 51, *Carrying out building work in contravention of section 42*
- Construction Occupations (Licensing) Act Section 40, *Failure to comply with order*

The amendments in the Bill respond to the nature of the offences and the potential consequences of failing to comply with the relevant regulations. Construction work carries significant health and safety risks. However, penalties in both the Construction Occupations (Licensing) Act (COLA) and the Building Act are relatively low. For example, failing to carry out building work that involves handling asbestos or disturbing friable asbestos in accordance with section 42 of the Building Act carries a maximum penalty of 50 penalty points.

In contrast, offences with similar ramifications in other jurisdictional legislation and in related Territory legislation are commensurate with the seriousness of the offence. For example, under the *Dangerous Substances Act 2009* failure to comply with a safety duty and exposing property or environment to substantial risk of substantial damage carries a maximum penalty of 1 000 penalty units, imprisonment for 3 years or both. Penalties for the *Work Health and Safety Act 2011* are similarly set for higher category offences.

Building Act, section 42A

Section 42A applies to building work that involves handling asbestos or disturbing friable asbestos. The current section provides for three offences:

- A person who carries out the building work commits an offence if the carrying out of the work contravenes section 42 – maximum penalty 50 penalty units (42A(2)). The offence is strict liability but a defence is provided (s 42 (4)) if the person can prove—
  - (a) the carrying out of the building work contravened section 42 only because friable asbestos was disturbed in carrying out the work; and
  - (b) either—
    - (i) the defendant took reasonable steps to minimise the risk of friable asbestos being disturbed; or
    - (ii) the disturbing of the friable asbestos happened in the defendant taking reasonable steps to minimise the risks resulting from the disturbance of the friable asbestos.
- The owner of the parcel of land where building work is carried out commits an offence if the work is carried out in contravention of section 42 the owner knows that the work is carried out in contravention of that section (42A (5)) – maximum penalty 50 penalty units.
- The owner of the parcel of land where building work is carried out commits an offence if the work is carried out in contravention of section 42 and the owner is reckless about whether the work is carried out in contravention of that section (42A (6)) – maximum penalty 20 penalty units.

Due to the very broad definition of building work and the fact that not all work that falls into that definition will be carried out by a licensed person, owners and other people carrying out exempt work could unwittingly disturb asbestos in a manner that breaches section 42. While it could be argued that due to the potential risks of disturbing asbestos that all people carrying out building work should educate themselves equally to be aware of asbestos, in practice all people carrying out building work will not necessarily have the skills of a licensed person, especially a specialist in asbestos assessment or removal.

Licensees will have a different requirement for training and awareness than the general public and so should be expected to have a higher performance requirement apply to them. Even amongst licensees, builders, asbestos assessors and asbestos removalists should have specialist understanding of the requirements that apply under section 42 of the Building Act and the carrying out of work involving asbestos. Offences should reflect these differences in the roles, skills and knowledge of people that may potentially handle or disturb asbestos.

This Bill replaces the existing offences in section 42A, *Contravention of requirements for building work involving asbestos* with the following new offences:

a. An offence for carrying out building work if the carrying out of the work contravenes section 42 that—
    i. applies to a builder, asbestos assessor or asbestos removalist licensed under the *Construction Occupations (Licensing) Act 2004* (including a person that is no longer a licensee but was at the time of carrying out the building work);
    ii. has a mental element of knowing or reckless; and
    iii. has a maximum penalty of 500 penalty points or 5 years imprisonment or both.

b. An offence for carrying out building work if the carrying out of the work contravenes section 42 that has—
    i. a general application to any person;
    ii. a mental element of intention; and
    iii. a maximum penalty of 300 penalty points or 3 years imprisonment or both.

c. An offence—
    i. applying to an owner of the parcel of land where the building work is carried out if the work is carried out in contravention of section 42;
    ii. has a mental element of intention; and
    iii. a maximum penalty of 300 penalty points or 3 years imprisonment or both.

It is also proposed to remove the defence in section 42 (4) described above. The Building Act does not prohibit the handling of asbestos or disturbing of friable asbestos in any circumstance. The Act clearly contemplates a regulatory system for the safe identification and removal of asbestos, which may include disturbing friable asbestos. The work must be carried out in accordance with relevant approvals and by appropriately licensed people acting in accordance with any applicable safety requirements and technical standards and carrying out the work with proper care and skill.

Therefore, some degree of disturbance is within the work covered by section 42 and the construction licensing system. It would not necessarily be a breach of section 42 if reasonable steps were taken to avoid disturbing the asbestos or the licensee took reasonable steps to minimise the risks resulting from the disturbance.

Building Act, Section 49

Section 49 requires that a person must carry out building work only in a way that will, or is likely to, result in a building that complies with the building code. The associated offence is a strict liability offence with a maximum penalty of 50 penalty points. Section 49 (3) provides that building work is taken not to result in a building that complies with the building code if, for each provision of the building code with which the building must comply—

(a) the building will not comply with the deemed-to-satisfy provision of the building code; and
(b) the approved plans for the building work do not state an alternative solution under the building code.

There are a number of different regulatory requirements that apply to building work under the Building Act – work may require a licensed builder, or may allow any person to undertake the work as long as it is in accordance with the building code amongst other things. While there is an expectation that any person undertaking building work will comply with the building code, there are only defined training and skills requirements for licence holders. Therefore, pending the review of the Building Act and potentially a revision of all offences and penalties in the Act, the strict liability offences would be best constrained to licence holders, with an associated infringement, with other offences applying to non-licensees. The Bill recasts the existing strict liability offence in 49 (1) to apply only to licensed builders.

The building code is a performance-based code and provides for 'deemed-to-satisfy' (DTS) solutions (which are prescriptive technical standards) and alternative solutions (which are non-standard solutions to meet defined performance criteria). There are also verification methods that may be located outside of the DTS solutions. While the presence of an alternative solution does not in itself indicate compliance with the alternative solution or the building code, for the purposes of this strict liability offence if a person has not complied with the DTS and has not identified an alternative solution in an approved plan this is taken to not meet the building code. In effect, this means that if any of the relevant provisions are not met a person has committed an offence.

The building code includes provisions for structural soundness, fire resistance and protection, access and egress including for escape in hazardous situations, hazard management, health and safety. Building licensees are aware that failure to comply with the building code could result in extremely serious consequences, including the death of building users. Therefore, this Bill proposes two additional offences as described below. Both of these offences include a mental element.

For carrying out building work in a way that will not or does not result in a building that complies with the building code—

- An offence that —
    i. is for a person that is a licensed builder;
    ii. has a mental element of knowing or reckless; and
    iii. has a maximum penalty of 500 penalty points or 5 years imprisonment or both; and

- An offence that has—
    i. a general application to any person carrying out building work;
    ii. a mental element of intention; and
    iii. a maximum penalty of 300 penalty points or 3 years imprisonment or both.

Building Act, Section 51

Section 51 requires that building work must not be begun or carried out except in compliance with section 42 (Requirements for carrying out building work). Section 42 outlines the requirements for carrying out building work, which include that:

- building work must be carried out in accordance with approved plans;
- work that requires a licensed builder is only carried out by or under supervision of the licensee mentioned in the commencement notice;
- the licensed builder takes all required safety precautions;
- the materials used in the building work must comply with the standards under the building code for the materials in buildings of the kind being built or altered;
- the way the materials are used in the building work must comply with their acceptable use under the building code for buildings of the kind being built or altered; and
- the building work must be carried out in a proper and skilful way.

Failing to comply with these requirements can have serious implications for the health, safety and amenity of a building, building occupants and other parties.

Section 51 provides an offence applying to the owner of the parcel of land where the work is carried out and the person who carries out the work. The offence is strict liability but provides a series of defences.

It is proposed to retain the existing strict liability offence for licensed builders only. Builders should be fully aware of whether a valid approval is in place for the work that they do. However, for fairness the strict liability offence is not committed if the builder had been issued with an exemption B notice not more than 3 months before the day the building work began stating that the building work was exempt from requiring a building approval.

As owners should also be reasonably aware that there is sufficient approval for work on their land and that they do not encourage non-compliance, instead of providing a strict liability offence with a defence it is proposed that an alternative offence with a mental element of intention applies to land owners. This would also apply to parties contracted by a licensed builder to carry out building work.

There is also a need to distinguish between licensed builders and other parties that are carrying out work in relation to their obligations under section 42. Other considerations in section 42, such as how the work is carried out, will apply differently to the person doing the work who is expected to have certain skills and knowledge, a person that does not require a licence to do the work who may not have formal training, and an owner of the parcel of land where work is being done (where they are not the person carrying out the work) who may not be expected to have particular knowledge of technical standards.

The Bill proposes two new offences section 51, *Carrying out building work in contravention of section 42,* for building work begun or carried out on a parcel of land in contravention of section 42—

a. An offence that —
    i. applies to licensed builders only;
    ii. has a mental element of knowing or reckless; and
    iii. has a maximum penalty of 300 penalty points or 3 years imprisonment or both.

b. An offence that has—
    i. a general application to:
        a. any person carrying out building work; or
        b. the owner of the parcel of land on which building work is carried out;
    ii. a mental element of intention; and
    iii. a maximum penalty of 200 penalty points or 2 years imprisonment or both.

These offences are also intended to capture situations where there is a building approval or exemption B notice for the work and the person knew, or could reasonably be expected to know, that it was incorrect, revoked or should not have been issued.

Failure to comply with a rectification order

Section 40 of the COLA includes an offence that carries a maximum penalty of 200 penalty points for intentionally failing to comply with a rectification order. At present, the largest rectification order currently active is for close to $1.5 million of work. The Registrar is considering another matter which has an estimated value of between $10 million and $15 million. The current low level of penalty does not provide pressure on licensees to consider the costs of rectification against the potential penalties for failing to comply with an order, and does not reflect the potential seriousness of failing to rectify a building that may have defects affecting, or potentially affecting, the health and safety of occupants.

As the *JACS Guide for Framing Offences* notes, a maximum penalty should be adequate and appropriate to act as an effective deterrent to commission of the offence to which it applies. A heavier penalty will be appropriate where there are strong incentives to commit the offence, or where the consequences of the commission of the offence are particularly dangerous or damaging. At the current level of penalty, there is no incentive for a person that receives a rectification order for work costing more than the penalty to comply with the rectification order, especially where the person has saved considerable costs from failing to comply. Therefore, the penalties are not adequate to deter an offence in the majority of cases.

The Bill includes a proposed increase in the maximum penalty for intentionally failing to comply with a rectification order from 200 penalty points to 2000 penalty points. On the current value of a penalty unit, this would raise the maximum penalties:

- From $28,000 to $280,000 for an individual
- From $140,000 to $1.4 million for a corporation

While this level still may not punish a worst case offence, noting that for severe non-compliance rectification costs may extend into the millions of dollars and the work could involve demolition and rebuilding of large and complex structures, this level of penalty is expected to place sufficient pressure on licensees to comply.

Justification of penalties

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

1. At the highest function, the construction services covered by the Act are regulated for life and health safety matters, including handling of asbestos, fire prevention and protection, and structural integrity of buildings;
2. The prevalence of failing to comply with existing requirements, particularly for complying with rectification orders issued under the COLA, is relatively high in the regulation of the construction sector;
3. The consequences of not complying with procedures and technical standards for work can be high and include serious injury or death to workers, building occupants and other members of the public;
4. Failing to comply is an obstruction of the enforcement of the relevant Acts;
5. The penalties reflect the seriousness of the offence relative to offences of a similar nature e.g. in the Dangerous Substances Act and Work Health and Safety Act; and
6. The penalties reflect the relative seriousness of the particular offences within the legislative scheme and the level of responsibility carried by the people falling within the obligation.

New offences that have a penalty of imprisonment are warranted when considering that failure to comply with the Building Act can:

- be an abuse of authority or trust
- be an obstruction of law enforcement
- endanger life or property
- result in intentional damage to property; and
- affect a person legally or safely occupying and using their property.

While there a number of offences in the Building Act, the majority of breaches that could cause life safety and other problems can be encapsulated by offences in section 42A, section 49, and section 51. It is proposed to recast the offences in these sections to more appropriately reflect the potential seriousness of non-compliance and the different roles of land owners, licensees and other parties in relation to building work.

While not all breaches of the relevant sections will result in serious consequences, the penalties comply with the principle that an offence should have a single maximum penalty for an offence that is adequate to deter and punish a worst case offence including the case of a repeat offence.

Standard defences available in the *Criminal Code 2002* would apply to these offences.

<u>Level of penalty set for regulation-making power in the Electricity Safety Act</u>

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

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

The Electricity Safety Act covers matter of fundamental life safety, health and environment protection, the safe and effective operation of electrical installations, managing electrical accidents, and minimising the impact of an individual electrical installation on the utility network. The potential ramifications of offences under the Act are at least as serious as non-compliance under the above Acts. Therefore, there is justification for a higher level of 60 penalty points.

The Assembly may disallow or amend regulations made under section 66 if it feels that the level of penalty is not appropriate to the offence. The control of the Assembly does not end once the regulation has been made. If a member of the Assembly is concerned about the penalty after the disallowance period expires, the member may present their own amending regulation for consideration by the Assembly. This provides reasonable scrutiny of the exercise of the provisions.

Strict Liability Offences

This Bill removes an existing strict liability offence under section 42A and recasts the strict liability offences in section 49 and 51 of the Building Act to apply only to relevant construction licensees.

This Bill also expands powers for authorised people under the *Energy Efficiency (Cost of Living) Improvement Act 2012* to direct a retailer to either destroy or otherwise dispose of a thing, or make the thing safe if the authorised person believes on reasonable grounds that an eligible activity by an electricity retailer relating to the thing is a reason for the thing being unsafe. Failing to comply with a direction under section 47 is a strict liability offence. Retailers operate as regulated actors under the Act, who should be aware of their responsibilities to undertake eligible activities in accordance with relevant safety and health standards.

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

In particular, where a defendant can reasonably be expected, because of his or her professional involvement, to know what the requirements of the law are, the mental (or fault) element can justifiably be excluded. The rationale is that people who are conducting aspects of building work in their professional capacity can be expected to be aware of their duties and obligations under the Building Act and the Energy Efficiency (Cost of Living) Improvement Act.

Where some knowledge or intention ought to be required to commit a particular offence, a specific restriction in the application of the offence is provided.

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

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

Human Rights Implications

Presumption of innocence

The strict liability provisions in clauses 12 and 13 of the Bill may engage the right to the presumption of innocence. This limitation is addressed below. Section 22 (1) of the Human Rights Act (HRA) states that everyone charged with a criminal offence has the right to be presumed innocent until proved guilty according to law.

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

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

Importance and purpose of limitation

The construction industry is regulated primarily because of the capacity of construction work to impact on the life safety, health and amenity of workers, the public and the eventual occupants and users of buildings and other structures. Regulation of the industry is in response to the high risks associated with the work. A licensee takes on certain responsibilities in relation to licensable work, including complying with the Construction Occupations (Licensing) Act and its operational Acts, such as the Building Act where relevant. Construction occupations licences can be held by corporations, partnerships and individuals.

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

Nature and extent of the limitation
The extent to which the presumption of innocence is limited and whether such interference is permissible depends on the context for any limitation. This Bill recasts the existing strict liability offences in section 49 and 51 of the Building Act so that they no longer apply to people that are not licensed practitioners. As noted in *R v Wholesale Travel Group Inc* [1991] 3 SCR 154 recognises that "The licensing concept rests on the view that those who choose to participate in regulated activities have, in doing so, placed themselves in a responsible relationship to the public generally and must accept the consequences of that responsibility. Therefore, it is said, those who engage in regulated activity should ... be deemed to have accepted certain terms and conditions applicable to those who act within the regulated sphere."

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

Relationship between the limitation and its purpose
Compliance with requirements for carrying out building work is related to a business context and is in place to ensure that building work complies with relevant health, safety, environmental protection and amenity standards. The offence applies to all licensees. As noted above, in each instance the duty holder knows, or ought to know, their legal obligations and the offences are part of a Bill that sets up a regime of regulatory offences.

Any less restrictive means available to achieve the purpose
These offences are existing offences. The revised application of the offences in the Building Act means that they no longer apply to people other than licensees. Other, less restrictive ways are not likely to achieve the required purpose. The prevalence of failing to comply with existing requirements is relatively high in the regulation of the construction sector. Where some knowledge or intention ought to be required to commit a particular offence, such as knowing an exemption B notice should not have been issued, a specific restriction in the application of the offence is provided.

Right to privacy
The Bill may engage the right to privacy. This limitation is addressed below.

Section 12 of the Human Rights Act states that:

Everyone has the right—

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

Section 47 of the *Energy Efficiency (Cost of Living) Improvement Act 2012*, which provides for powers of authorised people to destroy or make safe an unsafe thing. This section builds on existing powers, which have previously been considered and agreed by the Assembly.

Importance and purpose of limitation
Actions under the Act are regulated primarily because of their capacity to impact on the consumer protections, safety, health and amenity the occupants and users of buildings. The provisions do not widen the inspection powers but do allow an authorised person to make a direction to an owner and a retailer that may be responsible for an installation that is unsafe. At present, a notice may only be issued to a person in charge of premises, which may not be appropriate if they are not responsible for the safety of the thing in question.

As electricity retailers operating under the ACT are likely to be corporations, there is not expected to be any human rights implications of including retailers in the section.

Nature and extent of the limitation
The extent to which privacy is limited and whether such interference is permissible depends on the context and whether there is an expectation of privacy. As noted, this Bill does not give additional rights of entry or inspection powers to authorised people.

Section 12 of the Human Rights Act includes a qualifier that privacy is not to be interfered with 'unlawfully or arbitrarily'. The impacts on privacy in this instance are not arbitrary as the bill clearly defines the manner in which an authorised person may enter premises, the information that must be provided to and by an occupant or owner including the consent to enter any residential premises must be obtained, and the circumstances in which a notice may be issued. That is, the impact is necessary to administer the legislation.

Relationship between the limitation and its purpose
The inspection powers are in place to enforce legislation. Part of this will be to enter premises to inspect products installed under the scheme, some of which may have high safety implications if not installed correctly, to prevent unintentional or intentional non-compliance with the law.

In addition, activity record forms must be provided and signed by people receiving activities under the Act. This notice includes information about the potential for an authorised person to wish to carry out an inspection on the installed product under the Act.

Any less restrictive means available to achieve the purpose
There is no other, less restrictive way to achieve the required purpose. There are no other reasonable means available for accessing premises to inspect eligible activities under the Act, or for addressing safety risks if it is necessary for the Administrator to meet his obligations to administer and enforce the Act.

Clause Notes

Part 1 Preliminary

Clause 1 Name of Act

This clause provides that the name of the Act is the *Construction and Energy Efficiency Legislation Amendment Act 2013 (No 2).*

Clause 2 Commencement

This clause provides for the commencement of the Act on the day after its notification day.

Clause 3 Legislation Amended

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

Part 2 Building Act 2004

Clause 4 Contravention of requirements for building work involving asbestos Section 42A (2) and (3)

The offences in section 42A apply to building work that involves handling asbestos or disturbing friable asbestos. This clause removes the existing strict liability offence for undertaking such work in contravention of section 42 (Requirements for carrying out building work). It then substitutes a new offence applying to a builder, asbestos assessor or asbestos removalist licensed under the *Construction Occupations (Licensing) Act 2004*, which includes a person that is no longer a licensee but was at the time of carrying out the building work.

The new offence applies if the building work carried out by the licensee contravenes section 42 and the licensee knew or was reckless about the work failing to comply. The maximum penalty for the offence is 500 penalty points or 5 years imprisonment or both.

This offence, and associated penalty, is important when considering the dangerous nature of the work and the potential for widespread health problems caused by exposure to asbestos fibres. There is an expectation that licensees are aware of their legal obligations for handling and disturbing asbestos and would not knowingly or recklessly contravene requirements in place for the safe identification and management of asbestos.

Clause 5 Section 42A (4)

This clause omits a defence against the strict liability offence removed by clause 4. The Act provides for building work that may include handling asbestos or disturbing friable asbestos. The Act clearly contemplates a regulatory system for the safe identification and removal of asbestos, which may include disturbing friable asbestos. The work must be carried out in accordance with relevant approvals and by appropriately licensed people acting in accordance with any applicable skills, safety requirements and technical standards.

Therefore, some degree of disturbance is within the work covered by section 42 and the construction licensing system. It would not necessarily be a breach of section 42 if reasonable steps were taken to avoid disturbing the asbestos or the licensee took reasonable steps to minimise the risks resulting from the disturbance. This could be considered inherent in carrying out work in a proper and skilful way as required by section 42. Given this, and that the offence this would apply to is no longer a strict liability offence, this defence is not required.

Clause 6 Section 42A (5) and (6)

To complement the new offence in clause 4 this clause inserts two new offences for section 42A applicable to carrying out building work that involves handling asbestos or disturbing friable asbestos in contravention of the requirements for building work in section 42.

The first offence has a general application to any person that carries out building work. This is important because the presence and location of asbestos on a site will not be known prior to the commencement of work in every circumstance and there is a limited subset of building work that involves handling small quantities of bonded asbestos that may be carried out by other regulated construction practitioners.

People carrying out building work should have a reasonable awareness of asbestos, the potential hazards it poses and the regulations for identification and management of asbestos. The offence applies if the person intended to carry out the building work in a way that did not comply with section 42 of the Act. The maximum penalty for the offence is 300 penalty points or 3 years imprisonment or both.

The second offence applies to an owner of a parcel of land where the relevant building work is carried out. The offence also has a mental element of intention and carries a maximum penalty of 300 penalty points or 3 years imprisonment or both. The level of awareness of the risks and regulations surrounding asbestos of a land owner who does not engage in building work may not be as high as those providing construction services to the public. However, the offence is reasonable as where a land owner is aware of the requirements and intended for the work not to comply it should be treated as seriously as other offences under the section.

Clause 7 Structural engineer's certificate
Section 47 (1)

This clause amends section 47 (1) to clarify the intent of the provision, which is that a certifier may request a new certificate or certificates from the owner, rather than only a pre-existing certificate.

Clause 8 Section 47 (2)

This clause makes a consequential amendment to section 47 (2) to reflect the amendment to section 47 (1) (clause 7) clarifying the ability for a certifier to request a new or existing certificate about the structural sufficiency, soundness and stability of the building as erected or altered.

Clause 9 Section 47 (3)

This clause makes a consequential amendment to section 47 (3) to reflect the amendment to section 47 (1) (clause 7) clarifying the ability for a certifier to request a new or existing certificate about the structural sufficiency, soundness and stability of the building as erected or altered.

Clause 10 Completion of building work
Section 48 (1) (a)

Section 48 outlines the action a certifier must take, and the information and advice the certifier must provide to the Construction Occupations Registrar, on completion of building work. Builders must notify completion of work to a building certifier. Clause 10 amends section 48 (1) (a) to clarify that the section applies if the building work appears to the certifier to have been completed as opposed to any other party.

Clause 11 Section 48 (1) (c)

This clause omits section 48 (1) (c). Structural sufficiency is part of the certifier's consideration about whether the work has been completed in accordance with the Act and the building is fit for occupation under (sections 48 (3) (i), (j), (k) and (l)). Therefore, a separate provision is not required under s 48 (1).

Clause 12 Section 49

Section 49 provides an offence for failing to comply with the building code. This clause substitutes a new section 49 for the Act. The section:

- Recasts the existing strict liability offence to apply only to licensed builders;
- Adds a new offence for licensed builders if the builder knowingly or recklessly carries out building work that will not or does not result in a building that complies with the building code; and
- Creates a new offence for any person carrying out building work if the person intends to carry out the building work in a way that will not or does not result in a building that complies with the building code. This recognises that not all building work under the Building Act must be carried out by a licensed builder.

The strict liability offence (new section 49 (2)) preserves the existing provision that states that a building is taken not to comply with the building code if ─

(a) the building will not comply with the deemed-to-satisfy provision of the building code; and

(b) the approved plans for the building work do not state an alternative solution under the building code.

The building code is a performance-based code and provides for 'deemed-to-satisfy' (DTS) solutions (which are prescriptive technical standards) and alternative solutions (which are non-standard solutions to meet defined performance criteria). There are also verification methods that may be located outside of the DTS solutions. While the presence of an alternative solution does not in itself indicate compliance with the alternative solution or the building code, for the purposes of the strict liability offence if a person has not complied with the DTS and has not identified an alternative solution in an approved plan this is taken to not meet the building code.

This is important because building work must be carried out in accordance with approved plans. Any amendments to the approved plans must be approved against the requirements of the Building Act and building code before construction of the relevant parts of the building. An alternative solution requires expert evidence that it will meet the performance requirements before it can be approved. Under the legislation, the builder cannot simply decide after construction commences to build something other than what is approved and then ask for an approval to legitimise this after the fact. Building other than in accordance with approved plans is not compliant with the legislation.

A new example and note clarify the application of the strict liability provisions, especially to note that although some provisions of the building code may not apply to particular building work, for an offence not to be commissioned every provision of the building code that does apply to the building work must be complied with.

The clause inserts two other new offences for carrying out building work in a way that will not or does not result in a building that complies with the building code. The offence applying to a licensed builder that knowingly or recklessly carries out building work that will not or does not result in a building that complies with the building code has a maximum penalty of 500 penalty points or 5 years imprisonment or both. The offence for any person carrying out building work (which may include a licensed builder) that intends to carry out building work in a way that will not or does not result in a building that complies with the building code has a maximum penalty of 300 penalty points or 3 years imprisonment or both.

This is important because the building code includes provisions for structural soundness, fire resistance and protection access and egress including for escape in hazardous situations, hazard management, health and safety. Building licensees are aware that failure to comply with the building code could result in extremely serious consequences, including the death of building users.

New section 49 (6) provides that the offences do not apply if—

(a) the building complies with the building code as in force at the time the approved plans for the building work were approved; or

(b) if there are no approved plans for the building work or approved plans are not required for the building work—the builder complies with the building code as in force at the time the building work is carried out.

This is because the offences in section 49 relate to compliance with the building code – that is the technical standards for work. Other offences apply if work has been carried out without required approvals or in contravention of other parts of the Building Act.

Clause 13 Section 51

Section 51 requires that building work must not be begun or carried out except in compliance with section 42 (Requirements for carrying out building work). Section 42 outlines the requirements for carrying out building work, which include that:

- building work must be carried out in accordance with approved plans;
- work that requires a licensed builder is only carried out by or under supervision of the licensee mentioned in the commencement notice;
- the licensed builder takes all required safety precautions;
- the materials used in the building work must comply with the standards under the building code for the materials in buildings of the kind being built or altered;
- the way the materials are used in the building work must comply with their acceptable use under the building code for buildings of the kind being built or altered; and
- the building work must be carried out in a proper and skilful way.

Clause 13 substitutes a new section 51 for the Act. The section:

- Recasts the existing strict liability offence to apply only to licensed builders;

- Adds a new offence for licensed builders if the builder knowingly or recklessly carries out building work that does not comply with one or more of the requirements of section 42; and

- Creates a new offence that applies to;

    - any person carrying out building work, if the person intended that the building would not comply with one or more of the requirements of section 42, and

    - the owner of a parcel of land on which building work is carried out, if the person intended to have the building work carried out in a way that would not comply with one or more of the requirements of section 42.

There are six relevant subparagraphs in section 42. Failing to comply with any of these requirements can have serious implications for the health, safety and amenity of a building, building occupants and other parties during construction. It is important to note that all of relevant provisions in section 42 (1) (a) – (f) do not need to be contravened for the offence to apply. Only one of the elements in section 42 (1) need be proven to prove the offence.

It is proposed to retain the existing strict liability offence for licensed builders only. Builders should be fully aware of their obligations under section 42 and how to comply with them. However, for fairness an offence is not committed if the builder had been issued with an exemption B notice not more than 3 months before the day the building work began stating that the building work was exempt from requiring a building approval.

The offence applying to a licensed builder that knowingly or recklessly carries out building work that does not comply with one or more of the requirements of section 42 has a maximum penalty of 300 penalty points or 3 years imprisonment or both. The offence for any person carrying out building work (which may include a licensed builder) if the person intended that the building would not comply with one or more of the requirements of section 42, or for the owner of land that intends to have building work carried out in a way that will

not comply with section 42, has a maximum penalty of 200 penalty points or 2 years imprisonment or both.

These offences are also intended to capture situations where:

- there is a building approval or exemption B notice for the work and the person knew, or could reasonably be expected to know, that it was incorrect, revoked or should not have been issued; and
- parties contracted by a licensed builder to carry out building work intentionally contravene section 42.

The new offences are important as the Building Act places obligations on a number of parties, not only licensed builders. This includes obligations on other parties carrying out building work and land owners. The offences are reasonable because they are proportional to the obligations of each party and allow for the differing levels of skills, training and knowledge of various requirements under the Act. Where a land owner is aware, or could reasonably be expected to be aware of the relevant requirements and intended for the work not to comply it should be treated as seriously as other offences under the section.

Part 3 Construction Occupations (Licensing) Act 2004

Clause 14 Section 34 (2) (d) (i)

Under section 34 the Registrar may give an entity that provided a construction service, and the land owner in relation to whose land the construction service was provided, a written notice of an intention to make a rectification order. A notice must state that —

a. the Registrar will not make a rectification order if the registrar is not satisfied that it is appropriate to make a rectification order in relation to the entity, because of the relationship between the entity and the land owner; and
b. if the Registrar does not make a rectification order the Territory may authorise someone else to do the things stated in this notice, and the entity will have to pay for the things to be done.

The Bill amends section 37 to expand the criteria for the Registrar to consider when deciding if it is not appropriate to issue a rectification order to an entity. This clause revises section 34 (2) (d) (i) to remove the reference to the single criteria of the relationship between the entity and the land owner in response to the amendments to section 37 (1) (c) in clause 15.

Clause 15 Rectification order inappropriate Section 37 (1) (c)

Under section 37 the Registrar may decide that it is inappropriate to issue a rectification order to an entity that carried out a construction service because of the relationship between the entity and the land owner. To prevent further health, safety or consumer protection issues arising where the entity is not able to competently carry out the work required under the order or arrange for it to be undertaken, this clause inserts an additional consideration for the Registrar.

Under the new provisions, the Registrar can decide it is inappropriate to issue a rectification order to an entity if satisfied on reasonable grounds that the entity is not able to do a thing in the way that would be required by the order. This could include consideration of the extent of the failings of the entity related to the rectification work and the extent of the work needed.

The Registrar would be able to apply these criteria to any potential order under consideration at the time of commencement.

Authorising another licensee to enter land to complete the rectification work instead of the entity that undertook the initial construction service under section 37 remains a reviewable decision.

Clause 16 Rectification order offence
Section 40

This clause increases the maximum penalty for intentionally failing to comply with a rectification order from 200 penalty points to 2000 penalty points. This is important when considering:

- the potential cost of rectification work;
- the potential consequences of not rectifying a defect in a building or installation that affects the health and safety of occupants or the public or their ability to fully occupy or use all or part of their property;
- the need for the penalty to be commensurate with the seriousness of the offence.

Rectification work can cost millions of dollars. As the *Guide for Framing Offences* notes a maximum penalty should be adequate and appropriate to act as an effective deterrent to commission of the offence to which it applies. A heavier penalty will be appropriate where there are strong incentives to commit the offence, or where the consequences of the commission of the offence are particularly dangerous or damaging. At the current level of penalty, there is no incentive for a person that receives a rectification order for work costing close to or more than the penalty to comply with the order.

Clause 17 Section 56 heading

Under section 56 the Registrar can apply to the ACT Civil and Administrative Tribunal (ACAT) for an occupational discipline order or take certain actions against a licensee. This clause substitutes the heading of section *Application to ACAT for occupational discipline* with *Occupational discipline* to cover the different types of action that may be taken under this section.

Clause 18 Section 56 (1)

This clause amends section 56 to clearly allow the Registrar to make an application to the ACAT and take an action under s 56 (1) (b).

The provision does not expand the range of actions that can be taken but gives the Registrar the ability to take one or more of the listed actions instead of having to choose between taking an action and making an application to the ACAT for an occupational discipline order.

If the registrar believes on reasonable grounds that a ground for occupational discipline exists in relation to a licensee, the registrar will be able to take 1 or more of the following actions—

(a) apply to the ACAT for an occupational discipline order in relation to the licensee;
(b) reprimand the licensee;
(c) require the licensee, or, if the licensee is a corporation or partnership, a nominee of the licensee, to complete a stated course of training to the satisfaction of the registrar or another stated person;
(d) impose a condition on the licence, or amend an existing condition

This is important as the Registrar may be required to take immediate action, such as impose a condition on a licensee to protect the public and prevent further harm, while arranging for and awaiting the outcome of an application for occupational discipline. A decision to take an action under section 56 is reviewable. This provision is complemented by amendments in clauses 17, 19 and 20.

Clause 19 Considerations before making occupational discipline orders New section 57 (2) (i)

This clause inserts a new section in 57 (2) that requires the ACAT to have regard to the any action already taken by the Registrar under section 56 when considering an application for an occupational discipline order in relation to a licensee. This is necessary to reinforce that the provisions are intended to assist with fair and appropriate occupational discipline.

Clause 20 New part 19

This clause inserts transitional provisions that apply to notices of intention to make a rectification order given prior to the commencement of the new grounds in clause 15 for authorising another licensee to complete the work instead of the person that received the notice. If no decision in relation to a notice has been made then the Registrar must issue a further written notice about the new grounds.

Requirements to include information about the potential of the Registrar to consider it inappropriate to make an order to the person in the notice inappropriate were introduced in the *Construction and Energy Efficiency Legislation Amendment Act 2013 (No 1)* (A2013-31). The previous amendments did not affect the existing scope of things that could be considered. As this Bill expands the range of things that may be considered, it is important for fairness to notify entities that may be awaiting a decision of the new arrangements.

Part 4 Construction Occupations (Licensing) Regulation 2004

Clause 21 Reviewable decisions Schedule 4, item 15, column 2

Schedule 4, item 15, column 2 provides that a decision by the Construction Occupations Registrar to take a disciplinary action against a licensee under section 56 (b) is a reviewable decision. At present, the three types of actions the registrar may take are included in that section. This clause amends column 2 as a consequential amendment to clause 56, which lists the three actions the registrar may take in separate subparagraphs under s 56 (b), (c) and (d).

Part 5 Electricity Safety Act 1971

Clause 22 Part 2 heading

Part 2 of the Act provides for certain requirements for electrical wiring work and electrical installations. This clause removes the existing heading for the part – *Electrical wiring work* and substitutes a new heading of *Electrical wiring work* and electrical installations to describe the full scope of the part.

Clause 23 Directions to rectify unsafe installations New section 8 (2A)

Clause 23 clarifies that a stated action for a direction may include a requirement for the entity to provide written information about the installation or work. Under section 8 if an inspector believes on reasonable grounds that an electrical installation is unsafe or has not been inspected, tested and passed as required under Part 2, or that electrical wiring work is unsafe or has not been carried out, or tested, as required under Part 2, the inspector may give the person who has carried out the relevant electrical wiring work a written direction to take stated action to make the installation or work safe and compliant with Part 2.

If a test or other work is performed, written evidence of this may be required to verify that either the work has been completed, or that the electrical wiring work or installation is compliant or functional as required by the direction. Standard testing requirements apply to work carried out under the Electricity Safety Act, and it is reasonable to request written evidence of completion of any work. This provision is necessary as it expected that part of the rectification process will be to have work certified or verified by a person that is qualified to do so.

This clause inserts examples of written information for the purposes of a written direction issued under the section. It includes a test report from a person who did the test and an electrical engineer's report about whether work complies with relevant standards.

Examples are not exhaustive – other information may include invoices, reports or other documents from a third party about the completion or compliance of the work. This may also be in relation to the impact on an electricity network caused by non-compliant work.

If a person does not have the correct licence or skills to carry out the stated action, the information would be arranged and paid for by the entity that was given the direction in accordance with new subsection 3A and 3B (clause 24).

Clause 24 New section 8 (3A) and (3B)

Under section 8, in certain circumstances an inspector can give a person that did electrical wiring work a written direction to make the installation or work safe and compliant with Part 2 of the Act. The person who did work may not be able to legally carry out any direction to make the installation safe and compliant if the person does not hold the appropriate class of licence to do the work. Similarly, certain skills and qualifications may be required to undertake a stated action. For example, a licensed electrician may be directed to provide a written report on the compliance of a system that could only reasonably be prepared by an electrical engineer. Electrical engineering is not licensable work in the Territory; however it requires particular skills and qualifications.

To clarify the responsibilities of the person that does not possess a relevant licence, qualification or skills to take a stated action this clause inserts new provisions that if the entity is not licensed, authorised or qualified, or is not appropriately experienced and skilled to do something required to be done under the direction, the entity must arrange, and pay for, the thing to be done by a person that is. This is important so that stated directions are complied with safely and competently, without causing damage or breaching a law of the Territory or another jurisdiction. The intention of the existing provisions is not that any entity given a direction can complete the work if they are not licensed or capable of doing the work to the required standard.

These provisions are consistent with similar provisions in section 38 of the Construction Occupations (Licensing) Act and section 22 and 32 of the Water and Sewerage Act.

Clause 25 Section 27

This clause replaces existing section 27 and substitutes similar provisions. The clause revises offence provisions so that they are consistent with the latest drafting practice. There are no changes to the nature of the offences in the section or the maximum penalties for the offences. Relevant regulation-making powers have been relocated to section 66 of the Act (see clause 27).

To provide readers of the Act with information about the concurrent operation of section 27 of the Act with the Commonwealth *Greenhouse and Energy Minimum Standards Act 2012* (GEMS Act) a new note is included to alert people to the existence of that Act and that section 27 only operates if a regulation is made for it. The GEMS Act provides for jurisdiction-specific legislation to operate concurrently with standards made under the GEMS Act (see section 9 of the GEMS Act). However, at the time of drafting all relevant standards previously included in ACT law were adopted under the GEMS Act and so no additional ACT standards have been made.

This clause also includes new examples of when a Territory law can apply even in the presence of the GEMS Act. This is important as the GEMS Act is not intended to exclude or limit the operation of a law of a State or Territory on the same subject matter under certain circumstances.

Clause 26 Power to inspect electrical wiring work Section 57 (1)

This clause inserts a new reference to part 2 in section 57 (1). This relates to the new heading for the part given by clause 22.

Clause 27 Regulation-making power New section 66 (2) to (6)

This clause relocates regulation-making powers relevant to section 27 (Energy efficiency requirements) to section 66 of the Act, which provides for regulation-making powers for the Act. Consistent with other legislation, it also includes a power for regulations to create offences and fix maximum penalties of not more than 60 penalty units for the offence. This is justified given the nature of the work the Act regulates and the potential ramifications of unsafe or non-compliant work.

New provisions 66 (3) and 66 (4) for the section allow that a regulation may apply, adopt or incorporate the law of another jurisdiction or an instrument as in force from time to time. Further that, if adopted the Legislation Act, section 47 (5) or (6) does not apply in relation to the law of another jurisdiction or an instrument applied, adopted or incorporated under a regulation. This is important as the Act predominantly regulates work of a technical nature and requirements for electrical equipment generally included in Australian Standards, which are subject to copyright and cannot be reproduced.

Part 6 Electricity Safety Regulation 2001

Clause 28 Section 2 heading

This clause makes a technical amendment to the heading of section 2 to revise the reference to the relevant section in the Act. The work mentioned in this section is exempt from section 4 of the Act and so this provision amends the heading to
Exemption from inspection etc—Act, s 4

Clause 29 Section 3 heading

This clause makes a technical amendment to the heading of section 3 to revise the references to the relevant sections in the Act. The work mentioned in this section is exempt both section 5 and section 6 and so the heading is amended to include a reference to s 6 (2).

Clause 30 Section 3

This clause makes a technical amendment to the reference to the relevant section of the Act. All of section 5 (1) should not apply in circumstances outlined in section 3.

Clause 31 Energy efficiency standards—Act, s 27 (5) (a) and (7)
Section 6

This clause omits the section 6 of the regulation. Relevant standards that were previously made under section 27 *Energy efficiency requirements* are now included under the Commonwealth GEMS Act (see clause 25). The GEMS Act replaces previous Victorian legislation on the same matter. Declaring a corresponding law is no longer required for the standards to have effect in the ACT. Administration and enforcement of the GEMS Act is the responsibility of the Australian Government.

Clause 32 Articles of electrical equipment—labelling
Section 8

This clause omits section 8 of the regulation. Relevant standards for energy efficiency labelling of products that were previously made under section 27 *Energy efficiency requirements* are now included under the Commonwealth GEMS Act (see clause 25). The GEMS Act replaces previous Victorian legislation on the same matter. Declaring a corresponding law is no longer required for the standards to have effect in the ACT. Administration and enforcement of the GEMS Act is the responsibility of the Australian Government.

Part 7 Energy Efficiency (Cost of Living) Improvement Act 2012

Clause 33 Information to be given to administrator
Section 19 (1) (f)

This clause amend s 19 (f) so that instead of having to report on the extent to which the obligation was achieved by paying an energy saving contribution, a tier 2 retailer must report on the extent to which the retailer is electing to pay an energy savings contribution to achieve the energy savings obligation.

This is required to align the reporting requirement with the new process to reporting and determining an energy savings result for certain tier 2 retailers under new section 20A in clause 37.

Clause 34 New section 19 (1A)

This section applies to a NERL retailer in a compliance period unless, during the compliance period the retailer did not—

(a) have electricity sales in the ACT;

(b) undertake eligible activities, including to complete eligible activities commenced in a previous compliance period;

(c) acquire or apply for approval to acquire an abatement factor under section 18; and

(d) have a carried forward shortfall or surplus from a previous compliance period.

This is important as, unless exempted, a retailer that had an energy savings obligation of zero for a compliance period when calculated under the Act and did not otherwise participate in activities under the Act would commit an offence if it did not report under section 19. Alternative methods are available to the Administrator to determine if a reporting obligation exists. If a retailer does not report but is required to under section 19, the retailer commits an offence and the existing maximum penalty may apply.

A note for the section clarifies that the retailer may express their energy savings contribution as a percentage of its obligation.

Clause 35 Compliance with energy savings obligations—retailer energy savings result
New section 20 (1A)

This clause amends section 20 so that it applies only to tier 1 retailers and tier 2 retailers that do not report that they will not achieve any part of their energy savings obligations by paying an energy savings contribution. This complements clause 37, which provides for situations where a tier 2 retailer does intend to pay an energy savings contribution.

Clause 36 Section 20 (7) and (8)

This clause amends sections 20 (7) and (8) to revise statutory time periods for providing notification by revising the current period of 2 weeks to 10 working days. This allows for public holidays when people may not available to provide documents or make decisions.

Clause 37 New sections 20A to 20C

This clause creates an alternative process for tier 2 retailers electing to pay an energy savings contribution to achieve all or part of their energy savings obligation. New section 20A uses the existing method for calculating an energy savings result for a retailer but as the retailer is intending to pay a contribution, any shortfall calculated under new section 20A (3) is a notional shortfall. Paying an energy savings contribution is a legitimate way to achieve an obligation so an actual shortfall will only occur if the retailer fails to pay a sufficient energy savings contribution to avoid a shortfall.

New section 20B outlines the information the Administrator is obliged to give the relevant retailer written notice of its retailer energy savings result including:

(a) any surplus to be carried forward to the next compliance period;
(b) any notional shortfall;
(c) the maximum percentage of the retailer's retailer energy savings result that the retailer may carry forward to the next compliance period;
(d) the amount of energy savings contribution the retailer told the administrator would be paid to meet the retailer's energy savings obligation;
(e) the amount of energy savings contribution that the retailer must pay to have—
    i. no shortfall; or
    ii. a shortfall no greater than that may be carried forward (the ***minimum payment***); and

(f) the penalty for failing to pay the energy savings contribution, which would be a penalty under section 22 of the Act.

The new section further provides that within 10 days of receiving the written notice, the retailer must notify the Administrator of the percentage of the retailer's energy savings result that the retailer elects to carry forward to the next compliance period; the amount of energy savings contribution that the retailer will pay; and acknowledgement of the penalty for failing to pay at least the minimum payment. This is important as failure to pay within the specified time means that the abatement relating to the unpaid amount is taken as a shortfall attracting shortfall penalties.

New section 20C provides that if a Tier 2 retailer does not pay their elected energy savings contribution within the period stated in the notice the energy savings contribution for the relevant compliance period is take to be 0 for the purposes of determining shortfall penalties under section 22.

Clause 45 provides for reviewable decisions relating to new section 20A.

Clause 38 Compliance with priority household obligations—retailer priority household result
Section 21 (7) and (8)

This clause amends sections 21 (7) and (8) to revise statutory time periods for providing notification by revising the current period of 2 weeks to 10 working days. This allows for public holidays when people may not available to provide documents or make decisions.

Clause 39 Section 22

Section 22 outlines circumstances where penalties for noncompliance apply. The section provides that the retailer is liable for penalties under that section if the retailer's energy savings result or priority savings result is a shortfall. There are two processes in the Act that are relevant to the penalty:

1. The process of the Administrator determining an energy savings result or priority household result.
2. The nomination and acceptance of a carried forward shortfall.

As read, the penalty could apply to the full shortfall including the carried forward shortfall (CFS). The Explanatory Statement for the Energy Efficiency (Cost of Living) Improvement Bill 2012 (located at http://www.legislation.act.gov.au/b/db_44295/RelatedMaterials/explanatory_statements.asp) explained the application of the penalty as follows (emphasis added):

"If *after carrying forward a shortfall to the next compliance period a shortfall remains*, the Administrator must notify the supplier of the applicable shortfall penalty as provided for in clause 22".

The shortfall penalty is not intended to apply to the percentage of the shortfall that is carried forward as a CFS as this would result in the retailer both having to make up the shortfall and pay a penalty for the same shortfall.

The Bill amends section 22 to clarify the application of penalties by creating the concept of a net shortfall. Each retailer with a shortfall or notional shortfall has an opportunity to elect an amount of the shortfall to be carried forward up to a maximum amount for the compliance period, as set in the Act. However, the Act does not require that the retailer nominates the maximum carry forward. The retailer must decide the amount to carry forward after notification from the Administrator, which includes information on penalties for any residual shortfall.

For example:

- for a retailer's energy savings result for compliance period 1 January 2014 to 31 December 2014 a retailer has a shortfall equating to 10,000 tonnes of carbon dioxide equivalent (t CO_2-e) of their energy savings obligations;
- the retailer is notified about the shortfall and that it can elect an amount no greater than 10% of the total shortfall to carry forward to the next compliance period;
- the retailer is not paying an energy savings contribution and decides to elect to carry forward 5% of its shortfall (500 t CO_2-e). Therefore, shortfall penalties would be calculated on the remaining 95% that was not carried forward.

The provisions also align with the separate calculations for each compliance period. Although a retailer may have a carried forward shortfall (CFS) for a number of compliance periods, a particular CFS only relates only to a single compliance period. If a CFS exists from the previous compliance period it is used in the determination of an energy savings result for a subsequent compliance period. If a shortfall is determined in the subsequent compliance year, the retailer needs to re-elect the amount of the carry forward shortfall for the new compliance period. On the last compliance period there is no ability to carry forward a shortfall and all of the shortfall will attract a penalty.

The Bill also includes an additional provision to correspond with the processes in new section 20A. This does not extend the application of the offence or relevant penalties.

Clause 40 New section 24A

This clause inserts a standard power for the Administrator to delegate her or his functions under the Act to a public servant. The Administrator need only delegate those powers he or she considers appropriate. In accordance with section 234 of the Legislation Act a delegation may have effect only in stated circumstances or subject to stated conditions, limitations or directions or only a stated part of a function may be delegated.

Clause 41 Power to enter premises
Section 32 (1) (d), new example and notes

This clause inserts a new example and note for section (1) (d) to alert readers of the Act to one of the potential reasons for an authorised person entering premises at any time if the person believes on reasonable grounds that the circumstances are no serious and urgent that immediate entry to the premises without the authority of a search warrant in necessary.

The example – an imminent risk to the health or safety of a person – and note highlight the links between 32 (1) (d) and powers under section 36 (3) and (4) and s 47 that may be exercised by an authorised officer in relation to an unsafe thing.

Rules about the safe installation of products apply to eligible activities under the Act. While it is not expected that eligible activities will result in a high number of unsafe installations, a number of eligible activities for the Act have safety risks that may need to be addressed from time to time.

Clause 42 Forfeiture of seized things
Section 46 (1) (b) (i)

Section 46 applies, amongst other things, if an application for disallowance of the seizure of a thing under section 48 has not been made within the required period. This clause amends section 46 (1) (b) (i) to reflect the amendment to the statutory timeframe in section 48 made by clause 44.

Clause 43 Section 47

Clause 43 substitutes a new section 47 (Power to destroy etc unsafe things) for the Act. Section 47 of the Act includes enforcement provisions including the ability for an authorised person to direct a person in charge of the premises to destroy or otherwise dispose of an unsafe thing.

Under the existing section 47 the authorised person can only place the onus on the owner, manager or occupier of the premises to destroy or dispose of an unsafe thing. The costs of an authorised person disposing of a seized thing would also need to be borne by the owner of the thing (in most cases the person who owns the premises) and each person in control of the premises (in most cases household occupants).

In accordance with the Act, a person acting in their capacity as an authorised person will only enter premises to exercise a function under the Act. In general, for residential and business premises (other than premises used by the retailer or their agents for business) this would be predominantly to inspect an installation or documents related to an eligible activity allowed by the Act.

The Act allows electricity retailers to undertake eligible activities to generate abatement factors for counting towards meeting an energy savings obligation. It is expected that the majority of the eligible activities under the Act will be carried out in residential premises. Tier 1 retailers must also meet a priority household target.

This clause inserts a power to direct the retailer, who may be the party responsible for the unsafe thing to, rectify an installation, or to destroy or dispose of it. Although there will be some instances where it is the owner or occupier of the premises that has made something unsafe, where the authorised person believes on reasonable grounds that an eligible activity by a NERL retailer relating to the thing is a reason for putting the health or safety of people at risk or the likelihood to cause damage to property or the environment, the relevant retailer could be given the direction under this section. This avoids the need to make parties other than the retailer responsible for the remedy of a situation they have not caused and has arisen because of dealings in good faith with a retailer.

Section 47 (7) allows recovery of costs incurred when an authorised person destroys, disposes of or makes safe something under this section. The debt can be recovered together and separately from the listed people, if the Territory is satisfied that carry come responsibility for making something unsafe.

Failing to comply with a direction under section 47 is a strict liability offence. It is reasonable to apply this to retailers operating as regulated actors under the Act, who should be aware of their responsibilities to undertake eligible activities in accordance with relevant safety and health standards. A retailer is also unlikely to be an individual and so there are no human rights implications to extending the strict liability offence to retailers.

The clause also expands the section to allow an authorised person to direct a person to make a thing safe, or take action to make something safe, as well destroy or otherwise dispose of it, as destroying the object may not be required to address the problem.

Clause 44 Application for order disallowing seizure
Section 48 (1)

Section 48 allows a person claiming to be entitled to anything seized under Part 5 of the Act to apply to the Magistrates Court within 10 days after the seizure for an order disallowing the seizure.

This clause amends section 48 (1) to revise statutory time periods for making an application from 10 days to 10 working days, to allow for public holidays when people may not be available to make an application.

Clause 45 Reviewable decisions
Schedule 1, new item 2A and 2B

This clause creates reviewable decisions for new section 20A (clause 37). Consistent with the reviewable decisions for existing section 20A, a determination of a retailers energy savings result is reviewable. Determinations of payments for achieving energy savings obligations are also made under 20B are also reviewable.