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THE LEGISLATIVE ASSEMBLY FOR THE AUSTRALIAN CAPITAL TERRITORY

PLANNING AND DEVELOPMENT LEGISLATION AMENDMENT BILL 2008

REVISED EXPLANATORY STATEMENT

Presented by
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This Revised Explanatory Statement relates to the *Planning and Development Legislation Bill 2008* (the Bill) as introduced into the Legislative Assembly.

Overview of the Bill

The purpose of this Bill is to amend the *Planning and Development Act 2007* (the Act).

The amendments include technical amendments and substantive amendments in relation to:

1. Powers of inspectors and authorised persons

It is sometimes necessary for ACT planning and land authority (ACTPLA) inspectors to enter private premises. For example, an inspector may need to investigate a complaint that suggests a "controlled activity" may be occurring or an inspector may need to check whether an occupier is complying with an order of the planning and land authority (for example, an order requiring removal of an unlawful structure). In some cases, the occupier may have received a notice requiring that certain rectification work (eg alteration of an unlawful structure) be carried out. If such a notice is ignored, then the authority can authorise a tradesperson to do the required work instead. In this case, an inspector and the authorised tradesperson may need to enter the relevant private premises to complete the required rectification work.

The Act permits entry by the inspector where the occupier consents to entry but does not include any fallback position (other than a search warrant which is impractical and inappropriate) if the occupier refuses entry or withdraws consent.

As a consequence, the following amendments are made by the Bill (clauses 34-44):

(a) the power to enter premises

(i) The Bill amends section 370 (clause 34) to give an authorised person (ie authorised tradesperson) the power to enter private premises where rectification work is to be carried out under the authority of a court order, referred to in the Bill as a "rectification work order" (see clause 44 which inserts new Part 12.5A). A court order can be obtained when consent to entry has been sought by written notice without success (clause 44, 402C(e)(ii)). A court order is also required for any rectification work outside standard business hours (clause 44, section 402C(e)(i)). A court order can also be obtained if consent to entry for rectification work is granted but later withdrawn and the rectification work is incomplete (clause 44, 402C(e)(iii)). Entry without consent cannot take place without a court order.

(ii) The Bill also amends section 389 (clause 36) in connection with the ability of an inspector to enter and inspect private premises. Inspection may be required for the purpose of determining whether a "controlled activity" (eg unclean leasehold, development without approval, development contrary to approval conditions - see section 339 and Schedule 2) is occurring. This step may be required, for example, to

investigate a complaint made under section 340 of the Act, or an inspector may need to enter private premises to see whether the occupier is meeting the requirements of a compliance order. For example, to check compliance with a controlled activity order (Part 11.3 of the Act) to clean up a leasehold or a prohibition notice (section 377 of the Act) requiring the cessation of prohibited development. The amendment permits the inspector to enter the private premises under a court order referred to in the Bill as a "monitoring warrant" (clause 44, Part 12.5B). A court order can be obtained when consent to entry has been sought by written notice without success (clause 44, section 402N). The amendments also confirm that an inspector can enter private premises in the company of an authorised person (tradesperson) in connection with rectification work either with consent (clause 36, section 389(1)(c) or with a court order (clause 44, Part 12.5A). Entry without consent cannot take place without a court order.

(b) powers once entry to premises is gained.

Clause 42 amends section 392 and inserts sections 392A, 392B, 392C and 392D. These sections set out the powers of inspectors once entry is gained to premises. The intention of the amendments is to make it clear what the inspector can actually do once they are on the premises. The intent is that the powers vary depending on the particular ground for seeking entry. In summary, the actions that an inspector is authorised to take when entering private premises with the consent of the occupier are less intrusive than the actions that may be taken when the inspector enters private premises under a search warrant. For example, if entry is gained by consent, the inspector may not require the occupier to assist in any way, nor may the inspector take any samples. If entry is made under a monitoring warrant or search warrant then the inspector can take samples and can require the occupier to provide reasonable assistance. An inspector may seize whole objects under a search warrant but in no other circumstance.

The power of an "authorised person" (tradesperson) to undertake required rectification work is set out in section 369. No changes are made to this provision. A "rectification work order" permits entry for the purposes of completing required rectification work and for no other purpose.

In conclusion, the amendments by the Bill incorporate the following procedures:

(i) An inspector can seek consent to enter private premises. If entry is refused, then an ***intention to enter notice*** is issued. Alternatively, an inspector can issue an ***intention to enter notice*** in the first instance without having sought consent to enter in person.

(ii) Inspector issues an ***intention to enter notice***. If the occupier is absent or refuses consent to entry then and only then can the inspector apply for a court order to compel entry. (A rectification work order may also be sought if access to private premises is required outside business hours).

(iii) Inspector obtains court order to compel right of entry under a "rectification work order" for rectification work or "monitoring warrant" for inspection (using reasonable force and with police or other assistance if necessary).

(iv) Search warrant – if investigation of a particular offence is required then a search warrant must be obtained from the court. The court must be satisfied that actions related to an offence under the Act are occurring or may soon occur.

2. Affordable housing strategies

Government policy is to progressively re-introduce 'over the counter' sales. This is a process to permit members of the public to attend a land development agency office and purchase any block currently available. This is consistent with sales practice in private land development firms.

'Over the counter' sales are intended to be available in respect of single residential blocks. Some schemes for 'over the counter' sales will restrict the class of people eligible to apply for such blocks, using income, previous ownership, stamp duty concession eligibility or other criteria. There are likely to be a number of schemes restricting eligibility using differing criteria.

In view of the Government's intention to restore this type of sale on a wide scale, it is proposed to amend the Act to specifically provide for this type of sale without the need to obtain the approval of the Territory Executive or the Minister (clause 22). It is also intended to make other amendments to reduce the quarterly reporting requirements for such sales to a more manageable level and to be more consistent with privacy requirements (clause 25).

In line with Government initiatives for affordable housing, the introduction of a statutory fee for applications to extend the time limits contained in a lease to commence and complete development is provided for (clause 33). The application fee is set at 5 times annual rates or as prescribed by regulation. The planning and land authority (the authority) may only approve an extension if satisfied on reasonable grounds that the extension would not cause an unacceptable delay to another development or land release. Generally, the maximum extension allowed will be a period of 3 years or a regulation may prescribe another period.

In preparation for the re-introduction of rental leases, an application to pay out a rental lease and convert it to a nominal rent lease has been removed from the definition of ***development*** (clause 4) and new administrative arrangements have been established for such applications (clause 31). The development application and approval process is not appropriate to this process which is essentially an administrative/financial matter rather than a planning matter.

3. Technical variations to territory plan without public consultation

The Bill includes provisions to permit specified technical variations to the territory plan to be made without additional public consultation (see clause 8 which substitutes section 89(1)(b)). This approach is appropriate to variations that are minor, for example correction of formal errors and minor re-alignment of zone boundaries consistent with original intentions (see clauses 7 and 11).

This approach is also appropriate where the variation is pre-determined. This is the case with variations that are required at the conclusion of the future urban area process following approval of an estate development plan for a new estate

area. In this case, the territory plan must be varied as required by the approved estate development plan. Public consultation in such cases has effectively already occurred through the processes leading up to the approval of the estate development plan including consultation on the development application for the estate development plan itself. In this case, further public consultation at the conclusion of the future urban area process would represent unnecessary delay in the release of land for affordable housing or other purposes. Public notification at this point is not required (see clause 8 and section 88).

The Act provides for technical amendments to be made to the territory plan to bring it into line with the national capital plan (see section 87(d)). This measure recognises the fact that the national capital plan has primacy in part because section 26 of the *Australian Capital Territory (Planning and Land Management) Act 1988* (Cwlth) states that the territory plan has no effect to the extent that it is inconsistent with the national capital plan. These technical amendments can be made without public consultation on the basis that they are in this sense pre-determined (see clause 8 and section 88).

4. Alternative public consultation methods for specified merit track development applications

Clause 13 substitutes a new section 152 on public notification of development applications. The new section permits specified merit track applications (identified in the regulation) to be publicly notified by means other than letters to neighbouring lessees. For these, public notification can be achieved in the form of an administrative notification, that is, through notice in the newspaper and a physical sign on the relevant land. This allows for public notification of applications such as estate development plans in new estate areas where letters to neighbours is impractical. The amendment ensures an appropriate methodology for public consultation. The minimum public notification requirements for merit track applications that are not identified for this purpose and for impact track applications remain unchanged.

5. Other amendments

A number of other amendments are made including amendments for transitional purposes.

Human rights issues in relation to powers of inspectors and authorised persons

It could be argued that clauses 34 to 44 of the Bill trespass unduly on personal rights and liberties under section 12 of the *Human Rights Act 2004* (the HRA). However, it is considered that the provisions are permissible as a reasonable limitation under section 28 of the HRA which provides that human rights may be subject only to reasonable limits set by Territory laws that can be demonstrably justified in a free and democratic society. In effect, section 28 requires that any limitation or restriction of 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.

Of necessity the application of the HRA in circumstances such as these does require some value judgments to be made. A judgment must be made about the value to society of privacy and the sanctity of the home as opposed to the protection of the community from development with unacceptable impacts on neighbours and the general community, the protection of the environment, and the effectiveness and integrity of planning legislation including the territory plan. In assessing whether rights have been trespassed upon within permissible limits, it is necessary to consider the objective of the provisions and whether the trespass is proportionate to the objective served by the provisions. The objectives of the planning legislation can only be achieved by ensuring the authority can effectively and quickly investigate complaints and where necessary issue and enforce compliance orders.

In the Discussion Paper by the Department of Justice and Community Services on a preliminary model law for a common set of inspectors' powers[1] it is stated, relevantly, at page 4:

"While the human right of privacy is paramount, it is generally accepted that an individual's right to privacy to a greater or lesser extent can be regulated by the state to ensure that the individual's pursuit of his or her self-interest is compatible with the community's interest in the realisation of collective goals and aspirations. For example, a manufacturer/retailer's compliance with product safety standards, a restaurateur's compliance with public health regulations, the employer's compliance with occupational health and safety regulations, or the developer's compliance with building codes or zoning regulations. Compliance in most cases can only be tested by inspection and perhaps, at times, unannounced entry and inspection of premises.

The underlying purpose of entry and inspection powers is to ensure compliance with legislation. While regulatory statutes permitting entry and inspection of premises provide for offences, they are enacted primarily to encourage compliance with the law".

It is considered that the limitations in the provisions serve a legitimate objective (encouraging compliance with the law), are rationally connected to achieving that objective and are the least restrictive means of achieving that objective. The safeguards built into the legislation (such as the need to obtain warrants or orders from a magistrate) ensure that the encroachment on human rights is proportionate to the objectives to be realised.

The strict liability offence in the Bill

Section 392B (Clause 42 of the Bill) creates a strict liability offence of failing to take reasonable steps to provide assistance to an inspector who enters a premises under a warrant.

As section 392B is a strict liability offence it engages sections 18(1) and 22(1) of the *Human Rights Act 2004.* The government notes the following features and

[1] Department of Justice and Community Services 2005 Review of Government Inspectors Powers, Discussion Paper, Model Law Common Sets of Inspectors' Powers http://www.jacs.act.gov.au

characteristics of the offence, which it believes justify the imposition of strict liability:

- The offence is regulatory in nature, and cannot be considered "truly criminal" in the sense that it does not involve conduct that is "morally wrong" or "reprehensible" (see *International Transport Roth GmbH & Ors v Secretary of State for the Home Department* [2002] EWCA Civ 185). Also, the offence would only apply in situations where investigation by an inspector is required to determine whether a controlled activity is occurring or to determine whether an alleged offence has occurred or to determine whether an occupier has complied with an already issued compliance order (such as a rectification direction), and would not apply to members of the community at large (see *Engle v Netherlands* (1980) 1 E.H.R.R. 647). Further, the maximum penalty does not involve imprisonment and is relatively minor (50 penalty units), and is principally intended to act as a deterrent, and not be punitive or "extract retribution for wrong doing" (see *Ozturk v Germany* (1984) 6 E.H.R.R. 409).

- The offence turns on the power of an inspector to direct a person to give them assistance in exercising a function under Chapter 12 of the Act. This is not a free standing power to issue a direction; rather, it is contingent on a warrant having first been issued by an independent judicial officer, which provides an additional safeguard in relation to the exercise of that direction.

- The offence is important to protect the integrity of the regulatory regime in the Act, and strict liability is necessary to ensure the offence can effectively be prosecuted. If the offence turned on an element of subjective fault, given the nature of the offence, it would be difficult for the prosecution to draw inferences that would contradict a defendant's assertion that they did not intend to contravene a direction. The Government notes that there is authority from the European Court of Human Rights and the Canadian Supreme Court holding that where the offence is not punishable by imprisonment considerations of "administrative efficiency" may be afforded some weight in determining whether the imposition of strict liability is justifiable (see *Re B.C. Motor Vehicle Act* [1985] 2 S.C.R. 486; and *R v The Corporation of the City of Sault Ste. Marie* [1978] 2 S.C.R. 1299,).

- In order to be convicted of the offence, the prosecution must not only show that the defendant failed to follow the direction, it also must show that the defendant failed to take all reasonable steps to comply with the direction (see s 392B(2)). In *Scrutiny of Bills and Subordinate Legislation Report 37 (2007),* the Scrutiny of Bills Committee commended the inclusion of a "reasonable steps" defence as a means of ameliorating the effect of strict liability. This is a similar view that has been taken by the Canadian Supreme Court in *R v The Corporation of the City of Sault Ste. Marie* [1978] 2 S.C.R. 1299. The requirement that the prosecution prove that the defendant failed to take all reasonable steps goes further than a reasonable steps defence in that with a reasonable steps defence there is a legal burden on the defendant to show that they took reasonable steps, whereas section 392B(2) puts a legal burden on the prosecution to prove that the defendant didn't take all reasonable steps.

The Government is of the view that when the totality of the above factors are considered together, the imposition of strict liability is reasonable and

demonstrably justified under section 28 of the *Human Rights Act 2004,* especially when considered in light of relevant international jurisprudence concerning offences of a similar nature.

Outline of Provisions

Part 1 Preliminary

Clause 1 – Name of Act
Names the Act as the *Planning and Development Legislation Amendment Act 2008*.

Clause 2 – Commencement
Provides the commencement provisions, noting that this Act will commence on the commencement of the *Planning and Development Act 2007* section 46.

Part 2 Planning and Development Act 2007

Clause 3 – Legislation amended – pt 2
Declares that it is the *Planning and Development Act 2007* that is being amended.

Clause 4 – Meaning of ***development*** - Section 7(1)(f)
Substitutes a new paragraph (f) in section 7(1) to specify that a variation of a lease that reduces the rent payable to a nominal rent is not part of the definition of ***development***. This removes a lease variation to vary a lease to a nominal rent lease from the development application process. The development application and approval process is not appropriate to this type of lease variation which is essentially a financial/administrative matter. A new administrative process is established for this (refer to clause 31 and 61).

Clause 5 – Section 7 (2) definition of ***subdivision***
Substitutes a new definition of ***subdivision*** in section 7(2) to expand the definition of ***subdivision*** to include the subdivision of land in future urban areas. This amendment clarifies the definition of ***subdivision*** in the Act which as it stands could be read as excluding subdivision as part of the future urban area process.

Clause 6 – Public availability of territory plan - Section 47(2)
Amends section 47(2) to include the words “from the authority” after “obtain”. This is to clarify that the documents referred to are obtained from the planning and land authority.

Clause 7 – What are ***technical amendments*** of territory plan? New section 87(ca)
Inserts a new section 87(ca) that specifies that a variation of the territory plan to change the boundary of a zone or overlay under section 96A is a technical variation. Note: a technical variation under 96A does not require public consultation (refer to section 88).

Clause 8 – Making technical amendments - Section 89(1)(b)
Substitutes a new section 89(1)(b) to clarify that the section applies to a plan variation that will constitute a technical amendment of the territory plan, if made, and that requires limited consultation under section 88.

Clause 9 – Part 5.5, heading
Substitutes a new heading for Part 5.5 to refer to rezoning generally because rezoning for boundary changes as well as future urban areas is now included in this part.

Clauses 10 and 11 Rezoning – future urban areas Section 95(2) and new section 96A
These amendments permit minor variations to the alignment of zone and overlay boundaries in the territory plan where the change is consistent with the intent of the original line. Such changes are sometimes necessary where more detailed surveys are done and the line is moved to better align with a scrub area boundary or to better align with the bank of a creek, or a newly surveyed lease boundary. Such minor adjustments are made from time to time under the current territory plan.

Clause 10 substitutes a new section 95(2) and inserts a new section 95(3) to clarify that the authority may vary the territory plan under section 89 to change the boundary of a future urban area if the change is consistent with the structure plan for the area. However, the authority must not vary the territory plan if part of the boundary proposed to be changed is aligned with the boundary of an existing leasehold.

Clause 11 inserts a new section 96A to clarify that the authority may vary the territory plan under section 89 to change the boundary of a zone or overlay if the change is consistent with the apparent intent of the original boundary line and the objective for the zone. However, the authority must not vary the territory plan to change the boundary of the zone if part of the boundary proposed to be changed is aligned with the boundary of an existing leasehold. These changes are able to be made without public consultation.

Clause 12 – Applications for development approval in relation to use for otherwise prohibited development - Section 137(2)(b)
Substitutes a new section 137(2)(b). This is for clarification purposes and does not change the substance of the subsection.

Clause 13 – Section 152
Substitutes a new section 152 that provides for different minimum notification requirements. The amendment is intended to permit notification of specified merit track development applications by notice in the newspaper and sign on the property rather than through letters to neighbouring lessees. These merit track applications are to be identified in the regulation. This allows for public notification of applications such as estate development plans in new estate areas where letters to neighbours is impractical. Clause 13 ensures an appropriate methodology for public consultation. The minimum requirements for impact track development proposals remain unchanged, that is, notification requires letters to neighbouring lessees, sign on the relevant land and notice in the newspaper.

Section 152(1)(a) sets out that the authority ***publicly notifies*** an application for a development proposal in the merit track that is prescribed by regulation for this paragraph, if the authority notifies the application in the manner prescribed by section 152(2). Section 152(2) specifies that in this case the authority may prescribe by regulation either of the following ways of notifying the application:

(a) major public notification under section 155, that is, a sign displayed on the place and an advertisement in a daily newspaper, and if applicable, under section 154, that is, notice to each person with a registered interest in the land; or
(b) letters to neighbouring lessees under section 153 and, if applicable, under section 154.

In any other case, section 152(b) sets out that the authority ***publicly notifies*** the application if the authority notifies the application under section 153 and 155; and, if the development proposal is, or includes, a lease variation, under section 154.

Clause 14 – Deciding development applications - Section 162(4)
Substitutes the words "registered tree" in section 162(4) with the words "regulated tree". The Dictionary is also amended by the Bill to include a definition of "regulated tree" (see clause 61). A "regulated tree" and "registered tree" are two different things under the *Tree Protection Act 2005* sections 9 and 10. The reference to "registered tree" in section 162(4) of the Act was incorrect and should have been a reference to a "regulated tree".

Clause 15 – New section 165A
Inserts a new section 165A to put it beyond doubt that the authority has the power to vary leases following development approval of a lease variation and that it must do so.

Clause 16 – Extension of time for further information – further information sufficient - Section 166(1)(b)
Substitutes a new section 166(1)(b). The Act permits the authority to request a proponent to provide further information about a lodged development application. If the request is posted to the proponent within 10 working days then the statutory time frame for assessing and deciding the application is extended by the time it takes the proponent to provide the further information.

The Bill amends this provision so that it applies where the authority *makes the decision* to request information within the 10 day period irrespective of when the proponent actually receives the request for further information in the post. In the absence of this amendment, the legislation effectively requires the authority to make the decision to require further information within 7 days because processing and postage typically takes 3 or more days.

Clause 17 – When is a s125-related EIS ***completed***? Section 209A(1)(b)(i) and (ii)
Substitutes a new section 209A(1)(b)(i) and (ii) for clarification purposes.

Clause 18 – Section 209A(1)(c)(ii)(A) and (B)
Substitutes a new section 209A(1)(c)(ii)(A) and (B) for clarification purposes.

Clause 19 – Definitions – ch 9 Section 234, new definition of ***single dwelling house lease***
Inserts a new definition of ***single dwelling house lease*** in section 234. A ***single dwelling house lease*** is a lease granted under section 240(1)(ca) or (cb) (see clause 22). This clause and following clauses 20-22, 24-25, 28-30 provide the

mechanism for the implementation of the Government's policy of providing over the counter sales which forms part of the affordable housing initiatives.

Clause 20 – Granting leases - Section 238(1), notes

Substitutes new notes in section 238(1). Note 1 is amended because amendments to section 239 mean that grants of leases by direct sale can be restricted by the authority. Note 2 is amended for clarification purposes.

Clause 21 – Section 239

Substitutes a new section 239 which allows the authority to restrict the people eligible for the grant of a lease under section 238 by stating in the notice of auction, tender, ballot or direct sale, a class of people eligible or ineligible for the grant of the lease. Under the Act, the authority could only restrict eligibility in relation to the grant of a lease by auction, tender or ballot and not direct sale. It is important for the Authority to continue to be able to restrict the classes of people eligible to participate in a lease sale process. This facility is essential to realise Government objectives from time to time release land for the benefit of a particular class. For example, the Government may wish to restrict those eligible for the direct sale of single dwellings to persons undergoing a degree of financial hardship. The criteria in this circumstance may be based on income, previous ownership, stamp duty concession eligibility or other criteria or combination of criteria.

Clause 22 – Restriction on direct sale by authority - New section 240(1)(ca) and (cb)

Inserts new subsections (ca) and (cb) in section 240(1). This amendment provides a mechanism in the Act and regulations to allow direct sales 'over the counter' by the authority. These sales do not require the Minister's approval. Section 240(1)(ca) provides a transparent way of saying that specific regulations under section 240 may state that the Minister does not have to approve the grant.

The addition of section 240(1)(cb) provides the necessary mechanic for 'over the counter' residential housing sales.

Clause 23 – Section 240(2)

Amends section 240(2) to make it clear that the Executive may approve *the grant* by direct sale of a lease rather than approve the direct sale of a lease.

Clause 24 – New section 240(4)

Inserts new section 240(4) to provide a definition of ***single dwelling house*** for section 240 due to the insertion of section 240(1)(cb) by the Bill (see clause 22).

Clause 25 – Section 242

Substitutes a new section 242 that sets out the reporting requirements in relation to the grant of leases by direct sale. The authority must give the Minister certain information and in turn, the Minister presents that information to the Legislative Assembly. Clause 25 amends section 242 to reduce the quarterly reporting requirements for 'over the counter' housing leases to a level that is both more manageable and more consistent with privacy requirements.

Clause 26 – Use of land for leased purpose - Section 247(1), note

Amends the note in section 247(1) to add the words "and s8, def ***use***, par (a)" after the words "par (d)". This is for clarification purposes.

Clause 27 – Section 247(2), new note
Inserts a new note in section 247(2) to clarify that the use of land for a home business is not exempt from requiring development approval unless the use is an exempt development.

Clause 28 – Restrictions on dealings with certain leases - Section 251(1)(c)

Substitutes a new section 251(1)(c) to exclude a lease granted to the territory, or a single dwelling house lease, other than a single dwelling house lease prescribed by regulation, from the provisions of section 251. This amendment means that the restrictions on dealings for 5 years under section 251 do not apply to these leases. Such leases, because of their unique characteristics, should not be subject to the 5 year restriction. Without the exclusion, leases sold over the counter would have be restricted for a period of 5 years.

Clause 29 – New section 251(2A)
Inserts a new section 251 (2A) that specifies that a regulation may exempt a lease from section 251 whether generally or in relation to a particular dealing. This provides greater flexibility in the Act for exempting leases from the restrictions imposed by section 251 if necessary. For example, if an income test is applied to the sale of a residential lease, section 251 would restrict the sale of that lease for 5 years to a person that also meets the income test unless exempted by regulation. Another example is when ballots are restricted to builders only. Section 251 would restrict the sale of a lease bought by a builder through such a ballot to other builders for a period of 5 years unless exempted by regulation.

Clause 30 – New section 251(3A)
Inserts a new section 251(3A) to ensure that leases to which section 251 apply are so marked by the registrar-general in the Land Titles register. This is for transparency purposes.

Clause 31- Section 273
Substitutes new sections 272A – D and new section 273 for section 273 of the Act which provide for varying a lease to remove land rent clause/s by the payout of land rent. Clause 31 provides a mechanism for land rent payout without having to go through the development application process. This is in preparation for the Government's intention to re-introduce land rental options for single residential blocks.

The application process is included in section 272A, the terms under which the authority must make a decision on an application in section 272B, the capacity for the Minister to make land rent payout policy directions in section 272C and the conditions under which the authority may refuse an application in section 272D. Section 273 states that the authority must vary the lease in accordance with the decision.

Clause 32 – Section 288
Amends section 288. Section 288 was previously section 281 of the presentation version of the *Planning and Development Bill 2006*. An amendment was made to section 281 of the *Planning and Development Bill* during the debate on the Bill in the ACT Legislative Assembly in August 2007. The amendment as it appears in the Act resulted in wording which is incomplete. Clause 32 rectifies this error and

makes the section consistent with the underlying purpose of the original amendment.

Clause 33 – New section 298A

Inserts a new section 298A and 298B which relate to applications for extension of time to commence or complete building and development. Section 298A applies if a lease includes a building and development provision requiring the commencement or completion of development within a stated time.

The lessee may apply to the authority at any time before or after the stated time has ended, to extend the stated time under section 298B. Section 298A(3) provides what must be included in the application and the calculation of the required fee. Under section 298A(4) the required fee is not affected by the number of stated times under the lease for which an extension is sought. Section 298A(5) sets out the meaning of A, B and D which appear in section 298A(3).

Section 298B specifies that the authority must approve the extension or refuse to approve the extension. Schedule 1, that deals with review of decisions, is amended by the Bill (clause 62) to include decisions made under section 298B. The authority may approve an extension only if satisfied on reasonable grounds that an extension would not cause an unacceptable delay to another development or land release. The authority must not approve an extension for more than the prescribed period or for a period that, together with any earlier extension, would total more than the prescribed period.

Section 298B specifies that the prescribed period is 3 years or if another period is prescribed by regulation, the other period. Section 298B (5)(b) also enables regulations that will enable differing time periods for a class of leases. This will allow, for example, the establishment of a hardship test for a time extension and enable the criteria for such a test to be established.

Clause 34 – Section 370

Substitutes a new section 370 which sets out when an authorised person (ie tradesperson authorised by the planning and land authority to undertake required rectification work) may enter premises where rectification work is to be carried out. Section 370 previously provided that an authorised person may enter a place where rectification work is to be carried out only with the consent of an occupier. The amendment to section 370 broadens the power to enter premises and enables an authorised person to enter premises where rectification work is to be carried out:

(a) with the consent of the occupier; or
(b) in accordance with a "rectification work order" (see clause 44 which inserts new Part 12.5A).

However, an authorised person must not enter the premises for the first time unless accompanied by an inspector.

Consent by an occupier includes consent given after a request by an inspector or after being given an ***intention to enter notice*** under section 391B.

An authorised person who enters premises may remain at, and re-enter, the premises to carry out rectification work whether or not the inspector remains at the

premises. If consent is given under section 370(1)(a) but then withdrawn by the occupier the authorised person must leave the premises.

Clause 35 – New section 376A
Inserts a new section 376A to give authorised persons immunity from civil liability for rectification work carried out in accordance with the directions of an inspector.

Clause 36 – Section 389
Substitutes a new section 389 which sets out that an inspector may enter premises:

(a) that the public has access to (except residential premises);
(b) if not with an authorised person, at any time with the occupier's consent; or
(c) if with an authorised person, during business hours with the occupier's consent (consent includes consent given after a request to enter by an inspector or after being given a notice under section 391B);or
(d) with an authorised person in accordance with a rectification work order; or
(e) in accordance with a search warrant or monitoring warrant.

An inspector may enter land around the premises without the occupier's consent to ask for consent to enter the premises or to give notice under section 391B.

Clause 37 – section 391 heading
Substitutes a new heading for section 391 for clarification purposes.

Clause 38 – Section 391(1)(b)
Substitutes a new section 391(1)(b) that sets out the procedure that an inspector must undertake when seeking the consent of the occupier to enter the relevant premises. The procedure includes:

- production of identity card; and
- informing the occupier of the reasons for seeking entry; and
- informing the occupier that consent to entry may be refused or withdrawn.

Clause 39 – Section 391(2)(a)
Substitutes a new section 391(2)(a) to ensure consistency with the new section 391(1)(b) inserted by clause 38.

Clause 40 – Section 391(4)
Substitutes a new section 391 (4) to include the situation when consent to remain on premises is withdrawn by an occupier.

Clause 41 – New sections 391A and 391B
Inserts new sections 391A and 391B.
New section 391A sets out the procedure that the inspector must undertake when seeking the consent of the occupier to enter the relevant premises in the company of an authorised person during business hours with the intention of carrying out rectification work. The procedure includes:

- production of identity card; and
- informing the occupier of the reasons for seeking entry (that is, a rectification notice was issued but not complied with and the accompanying authorised person is there to carry out rectification work); and

- informing the occupier that the inspector need not remain at the premises and the authorised person may return during business hours as required to complete the work; and
- informing the occupier that consent to entry may be refused or withdrawn.

If an occupier consents, the occupier must sign a written acknowledgment in accordance with section 391A(3).

New section 391B provides for entry to premises by an inspector under section 389(1)(b) to check whether a controlled activity has happened or is happening or to check whether a controlled activity order, rectification direction, prohibition notice or injunction is being complied with; or entry by an inspector with an authorised person under section 389(1)(c).

The inspector may give the occupier 2 working days written notice of the intent to enter (an ***intention to enter notice***). Section 391B(3)(b) specifies that the notice can be given without first asking for the occupier's consent to enter the premises. Sections 391B(4) and (5) set out what the notice must state. Before actually entering the premises, the inspector must indicate the reasons for entry; tell the occupier that if the occupier does not consent to the inspector or authorised person entering or remaining at the premises, a court order may be sought; and provide the occupier with a copy of the notice. An inspector must ask an occupier to sign a written acknowledgment of what the occupier was told.

Clause 42 – Section 392

Substitutes new section 392 and inserts sections 392A - D that set out the general powers of inspectors upon entry to premises. An inspector who enters premises may exercise the powers set out in section 392(1) if the inspector believes on reasonable grounds that the exercise of the power relates to a controlled activity or possible controlled activity; a prohibition notice; a rectification direction; an injunction; or an offence or possible offence against this Act. If an inspector enters the premises under a search warrant or monitoring warrant, the inspector may only exercise a power in relation to a matter if the warrant relates to the matter.

This section does not apply to an inspector who enters premises under section 389(1)(c) or (d). An inspector who enters under those sections has power under section 392A.

Section 392A specifies that an inspector who enters premises under section 389(1)(c) or (d) may give directions to the authorised person about how to carry out the rectification work. It is important to note that the type of rectification work that can be carried out and therefore the directions that can be given in relation to this work is circumscribed by other provisions in the Act. The planning and land authority may issue a rectification direction to a lessee or occupier requiring the person to carry out certain rectification work. This can only be issued if the lessee/occupier has first received a controlled activity order requiring that work be done or if the work is required to remedy a current development that is being carried out contrary to the conditions of a development approval (see sections 365, 366). In this circumstance a rectification direction can be issued requiring the necessary work to be done and the occupier has five working days to complete the work (see section 366). If and only if the occupier fails to complete the

required work, can the planning and land authority authorise a tradesperson to complete the required work. In this case the tradesperson is only authorised to complete the work that was required to be done under the rectification direction.

Section 392B specifies that an inspector who enters premises under a warrant may require the occupier or anyone at the premises to give the inspector reasonable help to exercise a power under this chapter. It is an offence if the person fails to take all reasonable steps to comply with the requirement. The offence is a strict liability offence and has a maximum penalty of 50 penalty units.

Section 392C provides that an inspector who enters premises under a search warrant or monitoring warrant may take samples of anything the inspector believes on reasonable grounds is connected with the matter to which the warrant relates. Section 392C(2) sets out the procedures and requirements associated with taking samples.

Section 392D specifies that an inspector who enters premises under a search warrant may seize anything at the premises that is authorised to be seized under the warrant.

Clause 43 – Section 394
Omits section 394 because its provisions are now included elsewhere with the other specific inspector powers.

Clause 44 – New parts 12.5A and 12.5B
Inserts new Parts 12.5A and 12.5B which deal with rectification work orders and monitoring warrants.

Section 402C sets out the circumstances in which an inspector may apply for a rectification work order. An inspector may apply for a rectification work order to enter premises to carry out rectification work if the authority has given a rectification direction, the rectification work has not been done and a person has been authorised to do the work, and one or more of the following circumstances exists:

(i) the rectification work proposed cannot reasonably be undertaken, or consent to entry cannot be obtained, during business hours; or
(ii) an inspector who has given notice under section 391B, or an accompanying authorised person, has been refused entry in accordance with the notice; or
(iii) a consent to the entry of an authorised person or accompanying person to carry out rectification work has been withdrawn.

Section 402N sets out when an inspector may apply for a monitoring warrant. An inspector may apply for a monitoring warrant in relation to premises if the inspector believes on reasonable grounds that a controlled activity has happened or is happening; there is a controlled activity order, prohibition notice, rectification direction or injunction in relation to the premises and any of the following apply:

(i) an inspector who has given a written notice under section 391B for entry has been refused entry in accordance with the notice;
(ii) a consent given to entry in response to a section 391B notice is withdrawn;

Sections 402D - I and 402O - T deal with the procedures relating to obtaining rectification work orders and monitoring warrants, respectively. Sections 402D and 402O specify what must be stated in an application and that it must be sworn. A magistrate may refuse to consider an application until the inspector gives the magistrate any further information the magistrate requires for subsection (2) (ss402E and 402P).

Sections 402E(2) and 402P (2) specify what the magistrate must be satisfied of before granting the order/warrant. A rectification order or monitoring warrant must be made out in relation to the applicant. However, an order or warrant may authorise another inspector to accompany the applicant to execute the order or warrant. The required content of a rectification work order and monitoring warrant is set out in sections 402F and 402Q respectively.

Section 402Q(e) specifies that the monitoring warrant must indicate its duration. If the monitoring warrant is to permit the inspector to enter premises to determine whether a controlled activity has happened or is happening (for example, an investigation into a possible controlled activity may be required as a result of a complaint to the authority) then the warrant lasts for only five working days. If the monitoring warrant is to permit the inspector to enter premises to determine whether a lessee/occupier is meeting the requirements of an order (for example, a controlled activity order, prohibition notice, rectification direction or an injunction) then the warrant lasts for the duration of the circumstance mentioned in new sections 402N(1)(a)(ii) to (v) or three months whichever is the shorter. Compliance orders such as controlled activity orders, prohibition notices, and injunctions may apply over a period of time. For example, a controlled activity order may require a lessee to cease conducting a home business without the required development approval for a defined period of time, or may require a lessee to clean up the grounds of a lease and maintain them in a clean state for a period of time. A prohibition notice may require a lessee to cease undertaking prohibited development and the notice may subsist over time. In such cases, it is important for the inspector to be able to enter the premises to assess compliance with the relevant compliance order from time to time as necessary for the duration of the compliance order. In such cases, the maximum period that a monitoring warrant will last is the duration of the compliance order. An overall maximum of three months applies. Three months is considered a sufficient period in all cases for ascertaining whether the requirements of a compliance order are being met and continue to be met.

Section 402G specifies what a rectification order made on application in person, the faxed copy of a remote order or a rectification work order form authorises. Section 402R specifies that the monitoring warrant authorises the stated inspector to enter premises in accordance with the warrant. Sections 402H and 402S allow an inspector to apply for an order or warrant remotely, that is, by phone, fax, radio or other form of communication if consent to the inspector's entry to the premises is withdrawn while the inspector is on the premises. The inspector may apply for the order before the application is sworn.
Sections 402I and 402T specify the processes to be carried out when a rectification work order or warrant is made on remote application. Subclauses (5) of 402I and T set out when a court must find a power exercised by an inspector was not authorised by a rectification work order or warrant made on remote application. Reasonable force may be used by an inspector in accordance with

the order or warrant to enter premises if the occupier is not present (ss402J and 402U).

Sections 402K and 402V specify what an inspector must do and say if an occupier is present when the inspector proposes to enter premises as authorised by a rectification work order or monitoring warrant.

Clause 45 – New section 416A
Inserts a new section 416A to implement a change in government policy about the erection of paling fences on open space boundaries. In the past, open space boundary fences were required to be made of wooden palings. However, a colour bond fence is now acceptable.

Section 416A provides for this change in policy by stating that a development requirement is taken to have been complied with if, instead of a basic paling fence, either a fence that is exempt from requiring development approval (see section 1.45 of Schedule 1 of the *Planning and Development Regulation 2008*) or a fence in accordance with a notice under the *Common Boundaries Act 1981* section 23 is erected.

Clause 46 – New section 422A
Inserts a new section 422A that specifies that a reference in the territory plan to an instrument prescribed by regulation is a reference to the instrument as in force from time to time. Section 422A(2) specifies that the Legislation Act section 47(6) does not apply to section 422A(1). This amendment permits the territory plan to reference instruments prescribed by regulation notwithstanding that the documents are updated from time to time.

Section 47(6) of the Legislation Act prohibits subordinate legislation (like the territory plan) from referencing the latest version of external documents that change from time to time unless this power is specified in the Act.

Clause 47 – Regulation-making power - Section 426(2)(c)
Substitutes a new section 426(2)(c) to enable the making of a regulation about the criteria a person must satisfy to be a consultant under section 213 of the Act. The amendment is needed because section 426(2)(c) of the Act provided a power to make regulations about the keeping of a list of consultants rather than a power to prescribe criteria that must be satisfied to be a consultant under section 213.

Clause 48 – Section 426(2), example 2
Substitutes the word “list” for the word “register” in section 426(2) example 2 for clarification purposes.

Clause 49 – New section 426(2A) and (2B)
Inserts new sections 426(2A) and (2B) to provide that a regulation may make provision about a matter by applying, adopting or incorporating (with or without change) a standard, or a provision of a standard, as in force from time to time. This amendment permits the territory plan to reference external documents such as Australian Standards notwithstanding that the documents are updated from time to time. Section 47(6) of the Legislation Act prohibits subordinate legislation (like the territory plan) from referencing the latest version of external documents that change from time to time unless this power is specified in the Act.

Clause 50 – Section 431
Substitutes a new section 431 in order to incorporate new section 446A which is inserted by Clause 52 of the Bill and to clarify that chapter 5 of the Act expires after 2 years except for sections 446, 446A and 467.

Clause 51 – Section 435 heading
Substitutes a new heading for section 435 for clarification purposes.

Clause 52 – Section 436 heading
Substitutes a new heading for section 436 for clarification purposes.

Clause 53 – Section 437 heading
Substitutes a new heading for section 437 for clarification purposes.

Clause 54 – New sections 442A and 442B
Inserts new section 442A and 442B. Section 442A specifies the transitional arrangement for the approval of a development application for a variation consisting of a subdivision that is applied for before commencement day of the Act but is approved by the authority after commencement day.

Section 442B specifies the transitional arrangement when an application to review a development application is lodged after commencement day of the Act but the application was lodged before commencement day.

Clause 55 – Transitional – application for development approval if lease and development condition under repealed Act - Section 446(2)
Substitutes a new section 446 (2) which specifies that the authority or Minister must consider the lease and development condition in making a decision under section 162 (Deciding development applications) in relation to a development application if the territory plan requires the condition to be considered.

Clause 56 – New section 446A
Inserts new section 446A that specifies that on and after the commencement day of the Act, the authority may make lease and development conditions and apply them in assessing a development application, and granting a development approval, to the extent that the territory plan requires. This only applies if the development application was made before the commencement day, relates to ***defined land***, involves an approval to subdivide land and the lease and development conditions are relevant to assessing the application and granting the approval. ***Defined land*** means land identified as such in the territory plan under the *Land (Planning and Environment) Act 1991*.

Clause 57 – Section 447, heading
Substitutes a new heading for section 447 for clarification purposes.

Clause 58 – Section 448, heading
Substitutes a new heading for section 448 for clarification purposes.

Clause 59 – New section 456A
Inserts a new transitional provision, section 456A, that deals with the application of new sections introduced at clause 33 of the Bill (ss298A and 298B which relate to applications for extension of time to commence or complete building and

development) in respect of leases granted prior to the commencement of the *Planning and Development Act 2007*.

The new section confirms any extensions made prior to the commencement of the Act, and deals with applications made before, but not decided, until after commencement. In these cases, the fees and time limits applicable prior to commencement of the Act will apply.

Applications for extension made after the commencement date of the Act must be assessed under the new provisions subject to the following. Any extensions of time covering periods before the commencement of the Act, even when made after commencement of the Act, will not count towards the maximum time extension aggregate permitted under the new section 298B. However, any extension period past commencement of the Act will count. Also, any extensions of time covering periods before the commencement of the Act will be subject to the fee applying under the repealed Act at that time. Extensions of time beyond the commencement date of the Act will be subject to the fee as set out in section 298A.

Clause 60 – Section 467, heading
Substitutes a new heading for section 467 for clarification purposes.

Clause 61 – Schedule 1, item 25
Substitutes "s272B(2)(c)" for "s273(1)(d)" in Schedule 1 item 25 due to amendments to section 273 of the Act by the Bill (see clause 31 for amendments to section 273 and insertion of section 272B in the Act).

Clause 62 – Schedule 1, new items 34A and 34B
Inserts new items 34A and 34B in Schedule 1 in order to include decisions under section 298B which is inserted by the Bill, clause 33.

Clause 63 – Schedule 2
Substitutes the words "(see s339 and s361)" for "(see s339)" in Schedule 2 because section 361 is also relevant to the Schedule.

Clause 64 – Dictionary, new definitions
Inserts new definitions in the Dictionary for the following:

business hours
*monitoring warran*t
prohibition notice
public consultation period
publicly notifies
rectification work order
regulated tree
remote application
remote order
remote warrant
search warrant

Clause 65 – Further amendments, mentions of *a place*
Substitutes the words " a place" with the word "premises" in the specified sections of the Act. This is for consistency of wording in the Act.

Clause 66 – Further amendments, mentions of *in relation to*
Substitutes the words "in relation to" with the word "for" in the specified sections of the Act for clarification purposes.

Clause 67 – Further amendments, mentions of *part*
Substitutes the word "part" with the word "chapter" in the specified sections of the Act because the provisions apply not just to the part but to the chapter.

Clause 68 – Further amendments, mentions of *place*
Substitutes the word "place" with the word "premises" in the specified sections of the Act. This is for consistency of wording in the Act.

Clause 69 – Further amendments, mentions of *proposal*
Substitutes the word "proposal" with the words "development proposal" in the specified sections of the Act for clarification purposes.

Part 3 Environment Protection Regulation 2005

This part amends the uncommenced amendments of the above regulation under the *Planning and Development (Consequential Amendments) Act 2007 A2007-*25 schedule 1 part 1.13.

Clause 70 – Legislation amended – pt 3
Declares that this part amends the *Environment Protection Regulation 2005.*

Clause 71 – Schedule 2, section 2.1, definitions of city centre, commercial C4 zone, commercial C5 zone, group centre, and office site
Substitutes a new Schedule 2 section 2.1 to remove some of the definitions included in the Schedule and to add some definitions.

Clause 72 – Schedule 2, section 2.1, definitions of town centre and TSZ2 services zone
Substitutes new definitions of ***town centre*** and ***TSZ2 services zone***
in Schedule 2 section 2.1

Clause 73 – Schedule 2, table 2.1, items 4, 5 and 6
Substitutes a new Schedule 2, table 2.1, items 4, 5 and 6 for clarification purposes.

Clause 74 – Dictionary, definitions of commercial C4 zone, commercial C5 zone and TSZ2 services zone
Substitutes new definitions in the Dictionary which are required as a result of the amendments to Schedule 2 by the Bill.

Part 4 Land Titles Act 1925

Clause 75 – Legislation amended – pt 4
Declares that this part amends the *Land Titles Act 1925*.

Clause 76 – New section 72D

Inserts a new section 72D that requires the registrar-general to note in the register that section 251 of the Act applies to a lease, if so notified by the authority.