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

**PLANNING AND DEVELOPMENT ACT (CONTROLLED ACTIVITIES)
AMENDMENT BILL 2019**

EXPLANATORY STATEMENT

Presented by

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PLANNING AND DEVELOPMENT ACT (CONTROLLED ACTIVITIES) AMENDMENT BILL 2019

This explanatory statement relates to the *Planning and Development Act (Controlled Activities) Amendment Bill 2019* (the Bill) as presented to the Legislative Assembly. It has been prepared in order to assist the reader of the Bill and to help inform debate on it. It does not form part of the Bill and has not been endorsed by the Assembly.

The statement must be read in conjunction with the Bill. It is not, and is not meant to be, a comprehensive description of the Bill. What is said about a provision is not to be taken as an authoritative guide to the meaning of a provision, this being a task for the courts.

Background

The purpose of the Bill is to improve the enforcement of controlled activities orders for unclean leaseholds.

Property owners have a responsibility to keep their leaseholds clean. A leasehold is unclean only if more than 30 percent of the undeveloped portions of the block that are clearly visible from the public domain are covered in items. Long grass and overgrown foliage do not constitute an unclean leasehold and is not calculated as part of the 30 percent, this instead falls under the purview of the emergency services as a potential fire hazard.

While most people comply with their legal obligations, there are property owners throughout Canberra who fail to keep their leasehold clean. Neighbours of these individuals have seen their quality of life and property values decline, and ratepayers end up footing the bill for the clean-up. It is unsafe and unfair on neighbours and other Canberrans that this behaviour continues despite controlled activities orders being put in place and rectification orders issued.

Failing to keep a leasehold clean can be a legitimate safety issue for the property owner, visitors, locals, and emergency services if they are responding to an incident. Furthermore, failing to keep a leasehold clean can lead to potentially poor health outcomes for the property owner and the adjacent residents due to rodents and other pests.

There is a lack of strict enforcement of controlled activity orders, including inspections and rectifications. Unclean leasehold issues will often drag on for years with limited action from the property owner and the government. While there may be some complex cases, there are property owners who continue to abuse the system and flout the rules. The current procedures and processes do not appear to be working. It is not unreasonable that these matters are dealt with promptly and effectively.

Overview of the Bill

The Bill introduces strict inspection and enforcement measures surrounding controlled activity orders related to unclean leaseholds.

The amendments mandate that no interim stay can be granted to properties subject to controlled activity orders giving them immediate effect; make the issuing of an ongoing controlled activity order non-reviewable; introduce regular inspections; insert firm deadlines for rectification works to be carried out; require that rectification works must be authorised if the subject of an ongoing controlled activity order refuses to comply; make individuals in breach of controlled activity orders liable for rectification costs; and increase penalties for multiple breaches or breaches in relation to commercial activity.

Human Rights

The provisions of the Bill have marginal potential effects on an individual's human rights. If an individual's human rights are limited in any capacity, the limitations would be reasonable.

Recognition and equality before the law

Nature of the right affected

Section 8 of the *Human Rights Act 2004* entitles individuals to the right to recognition and equality before the law. This right may be affected by the Bill inserting that no interim stay may be granted for controlled activity orders for failing to keep a leasehold clean, and making the issuing of an ongoing controlled activity order non-reviewable.

The importance of the purpose of the limitation

When an appeal to a controlled activity order is lodged, no enforcement can be undertaken on the property. This means that the planning and land authority is unable to issue rectification orders or otherwise enforce the conditions while the matter is waiting to be heard. A property can continue to deteriorate and potentially impact the health of others for many months before the matter is heard by the judiciary. Appeals may also be used to delay or prevent enforcement.

Ongoing controlled activity orders are only made when the person to whom the order is directed has contravened two or more controlled activity orders in the previous five years for failure to keep a leasehold clean. The making of an ongoing controlled activity order recognises the continued failure to comply with lease obligations. Ongoing controlled activity orders are not made lightly, and only after property owners continually fail to comply with their legal obligations.

The proposed changes would allow greater enforcement of leasehold conditions while matters were being heard and mean that individuals could not use the legal system to delay or prevent enforcement measures. There are significant health and safety factors that are relevant, not only to the property owner but also neighbouring residents.

The nature and extent of the limitation

The removal of the ACAT's ability to make an interim order staying the operation of the decision will make the controlled activity order immediately enforceable. However, there is a potential limitation in that a person adversely affected by the controlled activity order could decide to take action in the Supreme Court using the *Administrative Decisions (Judicial Review) Act 1989*. The Supreme Court could suspend the operation of the controlled activity order until the matter is heard.

Removing the appeal rights for an ongoing controlled activity order makes it similar to a strict liability offence. Importantly, there are many procedures and opportunities for rectification before an ongoing controlled activity order may be made. There are no changes to the revocation of an ongoing controlled activity order, this means that if an individual complies with the leasehold conditions it may be removed prior to the stated period of up to five years.

The relationship between the limitation and its purpose

There are significant public health and safety factors weighted in favour of these limitations. Unclean leaseholds can be harmful to the health of neighbouring residents through attracting rodents and other pests which contain diseases. There may also be safety issues depending on the items, for example large items may obstruct pathways or may become snake habitats.

Removing the appeal mechanism for ongoing controlled activity orders means that the order is enforceable and ACAT cannot be used as an excuse to delay or otherwise make the order invalid. The individual subject to the ongoing controlled activity order still retains their rights relating to the revocation of the ongoing controlled activity order and could still pursue the matter in the Supreme Court.

The seriousness of the ongoing controlled activity order is recognised through the repeated failure to comply with previous controlled activities orders. The making of an ongoing controlled activity order is based on recurring certain behaviours, and only after other options have been exhausted. The person is placed on notice about their behaviour through controlled activity orders and repeated contraventions, it is not unreasonable that legal principles apply similar to a strict liability offence.

Any less restrictive means reasonably available to achieve the purpose the limitation seeks to achieve

There is not thought to be any less restrictive means available to enable enforcement to occur. Judicial review is still retained in most cases and individuals can access interim stays through the Supreme Court, furthermore the Bill does not impinge on an individual's rights to have orders revoked. The treatment of ongoing controlled activity orders is consistent with strict liability principles. Furthermore, these changes only apply to unclean leaseholds and no other controlled activity orders which supports prioritising public health and safety.

Privacy and reputation and Freedom from forced work

Nature of the right affected

Section 12 of the *Human Rights Act 2004* entitles individuals to the right to privacy and reputation and section 26 ensures freedom from forced work. The Bill may potentially affect these rights through the mandating rectification works must take place and allowing authorised persons to enter the property; however these powers are already contained within the existing legislation.

The importance of the purpose of the limitation

Under the current legislation, the planning and land authority can require an individual to undertake certain actions or otherwise rectify their property to meet lease conditions. If an individual subject to a controlled activity order fails to perform the necessary rectification works, then the planning and land authority may authorise a person to carry out the works. The Bill makes the change that if an ongoing controlled activity order is in place, the planning and land authority must authorise a person to carry out the works.

These changes are essential for improved enforcement to ensure the health and safety of the property owner and local residents. Ongoing controlled activity orders are only made after multiple contraventions of other orders and remain in place for up to five years. They are intended to deal with recurring behaviour and require a strong response to ensure the lease and order conditions are complied with.

The nature and extent of the limitation

The Bill does not impact the rights of individuals to any extent further than the legislation. An individual's right to privacy is not unlawfully or arbitrarily interfered with as there are number of opportunities for the person to comply with the lease conditions and notice is provided before the authorised person commences work. The right to freedom from forced work does not include work that forms part of normal civil obligations, which includes complying with property law and keeping leaseholds clean.

The relationship between the limitation and its purpose

Under the current legislation, the authorised person only enters the property after the property owner has had a reasonable opportunity to undertake rectification works and has failed to do so. The authorised person is only authorised to carry out the rectification works, they are not authorised to enter or otherwise explore the property for other purposes. Work to rectify an unclean leasehold needs to occur for the health and safety of not only the occupant, but other local residents.

Any less restrictive means reasonably available to achieve the purpose the limitation seeks to achieve

There is not thought to be any less restrictive means available to achieve this purpose. The current legislation has not been effective in ensuring appropriate compliance and enforcement of leasehold conditions in a timely manner, necessitating the Bill. Importantly, the impact on human rights is consistent with the existing statute.

CLAUSE NOTES

Part 1 Preliminary

Clause 1 Name of Act

The clause provides that the name of the Act is the *Planning and Development (Controlled Activities) Amendment Act 2019*.

Clause 2 Commencement

The clause provides that the commencement date of the Act is the day after its notification day.

Clause 3 Legislation Amended

The clause provides that the Act amends the *Planning and Development Act 2007*.

Clause 4 New section 359A – No interim stay of certain controlled activity orders

This new clause sets out that no interim stay may be granted for controlled activity orders relating to unclean leaseholds during an appeal to ACT Civic and Administrative Appeals Tribunal. This means that the orders have immediate effect. This is aimed to prevent property owners from using the appeal process to stall or prevent enforcement of controlled activities orders in relation to failing to keep a leasehold clean.

Clause 5 New section 360A – Controlled activity order compliance inspection

This clause inserts a new requirement that the planning and land authority must inspect properties subject to controlled activities orders at least once every twenty working days, or within three working days of receiving a complaint. This ensures compliance and timely intervention by the relevant government authority.

Clause 6 Section 366(3)(f) – Direction to carry out rectification work

This clause sets out timelines for rectification works. For an ongoing controlled activity order, rectification work must be completed within a maximum of ten working days. For other orders, not later than five working days or a longer period specified in the notice. These two tiers recognise the serious and continuing nature of the ongoing controlled activity orders; but also allows some flexibility to be afforded to cases where additional time may be necessary.

Clause 7 Section 368(1) – Authorisation to carry out rectification work

This clause provides that if the planning and land authority has given a person notice of a direction to carry out rectification work and the person has not completed the rectification work by the end of the period stated in the notice, then an authorised person may enter the premises to complete the work. For an ongoing controlled activity order, the planning and land authority must authorise a person to enter to premises and carry out the rectification works.

This two-tier system again reinforces the seriousness of an ongoing controlled activity order while allowing some flexibility in other extenuating circumstances.

Clause 8 Section 371 – Liability for cost of rectification work

This clause provides that if rectification work is performed by an authorised person then the person subject to the ongoing controlled activity order must pay twice the reasonable cost of any rectification work carried out by an authorised person to which the direction relates. In other cases, the reasonable cost must be paid.

This reinforces the seriousness of breaching ongoing controlled activity orders. It is not unreasonable that the individual in breach of the controlled activity order reimburses the taxpayer for the necessary rectification work undertaken.

Clause 9 Schedule 1, items 44 and 45, column 2 – Reviewable decisions, eligible entities and interest entities

This clause inserts the exception that ongoing controlled activity orders are non-reviewable decisions.

Clause 10 Schedule 2, item 2, column 3 – Controlled activities

This clause details aggravating penalties for subsequent breaches of controlled activity orders. For an initial breach the penalty remains at 60 penalty units; the penalty then doubles to 120 penalty units for a second or subsequent breach, or if the contravention relates to a business or commercial activity. If the behaviour is repeated, it is not unreasonable that increasing penalties apply. Furthermore, if an individual is making financial gain from the breach, then this should act as an aggravating factor and the penalty increased.

Clause 11 Dictionary, definition of *authorised person*

This clause makes a technical amendment to a section number reference.