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

**PROPERTY DEVELOPERS BILL 2023**

**EXPLANATORY STATEMENT  
and  
HUMAN RIGHTS COMPATIBILITY STATEMENT  
(*Human Rights Act 2004, s 37*)**

**Presented by  
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## PROPERTY DEVELOPERS BILL 2023

This explanatory statement relates to the Property Developers Bill 2023 (the Bill) as presented to the ACT Legislative Assembly.

The statement is to be read in conjunction with the Bill. It is not a complete description but provides information about the intent of the provisions in the Bill.

It has been prepared to assist the reader. It does not form part of the Bill, has not been endorsed by the Assembly and is not to be taken as providing a definitive interpretation of the meaning of a provision.

The Bill is a Significant Bill. Significant Bills are bills that have been assessed as likely to have significant engagement of human rights and require more detailed reasoning in relation to compatibility with the *Human Rights Act 2004*.

### OVERVIEW OF THE BILL

The Bill:

- Establishes a licensing scheme for individuals and entities that engage in residential development activity.
- Establishes a regulatory scheme to bring property developers into the regulatory chain of accountability for building work they are involved in.
- Imposes obligations on individuals and entities that undertake residential development activity.
- Creates a statutory presumption that a claimed defect is a defect unless the builder and/or property developer prove to the contrary for a time-limited period.
- Extends the application of existing statutory warranties for residential building work to property developers to provide consumers with legal recourse directly to both the property developer and the builder if there are defects in residential building work to which the warranties apply that amounts to a breach of statutory warranties.

The scheme established by the Bill will apply to individuals and entities that engage in residential development activity and mixed-use residential development activity, that is the development of a mixed-use building that contains a residential component. Any expansion of the scheme to other property development activity will require a Bill.

The objects of the Bill are to:

- Protect the public by ensuring that residential development activities are carried out by people that are competent and have the capacity and capability to undertake those activities.
- Protect the public by ensuring property developers engaged in residential development activity are held responsible and accountable for development activities they carry out.

- Promote public confidence in the standard of residential development activities undertaken by property developers.

Building defects cost Australians in the order of \$2.5 billion nationally per year. At an annual cost of \$1.3 billion, Class 2 Apartment buildings account for 52 per cent of the total size of the problem. Within Canberra, residential building defects are estimated to cost well in excess of \$50 million annually. Defects and compliance failures can lead to high rectification costs including assessment, inspection and legal costs, increased safety risks for building users, the loss of value and/or income for affected buildings and a loss of confidence in the construction industry. In addition to the physical and mental health effects these defects can induce, the rectification costs and the potential resultant loss of property value are often borne by the consumer.

This plays into a negative public perception of developers which largely comes from poor behaviour and practice in a small portion of the industry. In the absence of any statutory obligations and accountability for property developers, consumers are limited in their ability to establish if a property developer is competent, is transparent in their dealings or acts ethically in the course of running their business.

Independent market research commissioned by the NSW Government on the "The State of Consumer Confidence" (McCrindle, May 2022) found that low confidence in purchasing residential property was driven by a distrust of developers. This research highlighted the majority of residents believed there was not enough information available to make an informed decision, and that therefore 50% of them would not be confident buying an apartment. The scheme seeks to address this issue and thereby promote confidence in the ACT as an attractive place to invest.

By the nature of the role that property developers play in the development process they have significant levels of influence and control over development outcomes, including setting the culture of a project, and influencing many aspects of the design, quality, and construction.

Property developers are not currently subject to a licensing or regulatory scheme that expressly covers their role in the development process. Establishing an effective regulatory regime will build confidence in the sector and improve outcomes for building owners and occupants. It will also positively impact on the economic sustainability of the development sector in the ACT.

This Bill provides the framework for a property developer licensing scheme (see Part 3); and a statutory chain of accountability that includes those undertaking residential development activity (see Part 5). The licensing and regulation of property developers engaged in residential development activity will provide the Government with additional tools to tackle the problems of defects and compliance failures in residential property developments, including before, during, and post construction, and reduce their societal impacts.

The Bill acknowledges the complex environment in which residential property developers operate and that they work with, impact and are influenced by a number of parties. It also acknowledges that they operate within a regulated environment

with a range of legislative frameworks already in place to cover different parts of the property development process (such as corporations, consumer and work health and safety laws).

The Bill will be supported by regulations and disallowable and notifiable instruments.

In development the regulatory framework in the Bill for property developers engaged in residential development activity, consideration was given to existing regulatory approaches in the ACT, particularly for builders (*Building Act 2004*, *Construction Occupations (Licensing) Act 2004*), and engineers (*Professional Engineers Act 2023*). Consideration was also given to the approaches to regulating residential property developers in other jurisdictions, in particular New South Wales, (the *Residential Apartment Buildings (Compliance and Enforcement Powers) Act 2020* (NSW)).

### *Licensing Scheme*

The Bill introduces a licensing scheme for residential property developers in the ACT. There is currently no requirement for residential property developers to be licensed in the ACT.

The Bill:

- establishes the threshold requirements that require a licence. The Bill provides regulation making power to expand the scheme in the future.
- establishes initial and ongoing eligibility criteria, including a requirement for applicants to demonstrate competence and their operational and financial capacity.
- allows for ongoing standards that licensed property developers must meet to be set (for example, code of practice or competency requirements).
- establishes a publicly available register of licensed residential property developers.
- establishes a Property Developer Registrar (the Registrar) who will have a number of functions and powers, including the power to place conditions on a licence, or suspend or cancel licences for failing to comply with the requirements in this Bill.
- establishes grounds for regulatory action, for example using false or misleading information to obtain a licence or committing an indictable offence.
- establishes offences; and
- provides the Registrar with powers to investigate breaches of the Bill, including the power to request information.

### *Statutory chain of accountability*

Parts 5 through to 12 of the Bill bring all property developers, whether required to be licensed or not, into the ACT's existing statutory chain of accountability for building work, to complement the regulation of builders and further strengthen the regulatory and accountability framework for property developers.

## **CONSULTATION ON THE PROPOSED APPROACH**

In developing the Bill, the Government consulted extensively with the public, industry, key stakeholders, and other jurisdictions in several ways between December 2022 and November 2023.

Public consultation through the ACT Government's Yoursay portal was undertaken between 30 January 2023 and 27 February 2023. Feedback was collected via written submissions and through an online feedback form and a quick poll. A discussion paper was provided that outlined a range of issues and asked questions about potential options to regulate property developers. The Government received 13 written submissions comprising seven industry and related industry organisations, one community body, four community groups and one member of the public. The Government also received five survey responses from the community and 47 quick poll responses. A Listening Report is available on the Yoursay website.

Extensive consultation has also been undertaken with key ACT industry representative bodies including the Construction Forestry Maritime Mining Energy Union, Housing Industry Association, Master Builders Association, Owners Corporation Network, Property Council of Australia, and Strata Community Association. This consultation included five stakeholder workshops as well as individual consultation with each of the abovementioned organisations.

The Government also met with counterparts from Queensland and New South Wales to discuss and understand their approach to developer regulation.

This consultation has informed this Bill, including defining who the Bill applies to, the incorporation of associated entities and key persons, and the inclusion of the option for the registrar to require reports from a regulated ratings agency.

The Government will continue to consult closely with these stakeholders on implementation of the scheme and in the development of subordinate legislation.

## **CONSISTENCY WITH HUMAN RIGHTS**

During the development of the Bill, due regard was given to its compatibility with human rights as set out in the *Human Rights Act 2004* (HRA).

An assessment of the Bill against section 28 of the HRA is provided below. Section 28 provides that human rights are subject only to reasonable limits set by laws that can be demonstrably justified in a free and democratic society.

### **Property Developer Licensing Scheme**

This section of the human rights assessment relates to the reforms contained in the Bill that establish the property developer licensing scheme.

The licensing scheme established by the Bill will require certain property developers to be licensed to undertake residential building development in the ACT and hold them to account for activities undertaken under that licence.

The licensing scheme will:

- Regulate people who wish to undertake residential development activity
- Mandate a minimum standard of competency in the residential property development industry
- Provide capacity to respond to poor behaviours and unsafe practices
- Increase transparency for the benefit of the community.

The Bill delivers the framework for a property developer licensing scheme that requires individuals and entities engaging in residential development activity to be licensed. It establishes eligibility criteria; a process for application, including the option for the registrar to request a report from a regulated rating agency that provides information about the applicant's operational and financial capability; outlines the decision-making process for granting a licence; provides for conditions to be placed on licenses; and provides that a public register of licensed property developers be kept. The scheme is designed to avoid entities structuring themselves so as to avoid the need to be licensed.

### **Rights engaged**

The Bill engages and limits rights in the following sections of the HRA:

- Section 8 – Recognition and equality before the law
- Section 12 – Privacy and reputation
- Section 16 – Freedom of expression
- Section 18 – Right to liberty and security of person
- Section 21 – Right to a fair trial
- Section 22 – Rights in criminal proceedings
- Section 27B – Right to work and other related work rights.

The licensing scheme will apply to any entity that meets the threshold requirements. This will include individuals, such as sole traders, as well as corporations. The overwhelming majority of prospective licensees will be corporate entities not sole traders, however the scheme provides the option for individuals to apply for licensing noting that they can undertake property development activities and thus engages and limits the above human rights as outlined in the analysis for each right.

Further, the human rights of individuals that are key persons for corporations that engage in residential property development activity will also be affected by this Bill, as it contains measures that relate to assessment of key persons and publication of key person information.

Key persons include the following:

- A director or secretary of a residential property developer or an associated entity of the residential property developer; and
- An individual who is in a position to control or significantly influence the

conduct of a residential property developer or an associated entity and includes an individual who—

- Directly or indirectly owns, holds or controls 25% or more of the shares in either corporation, or 25% or more of a class of shares in either corporation; or
- Gives instructions to an officer of either corporation and the officer generally acts on those instructions; or
- Makes, or participates in making, decisions that affect the whole or a substantial part of either corporation's business or financial standing; or
- Engages in conduct or makes representations that would cause someone else to reasonably believe the person controls, or substantially influences, either corporation's business.

**Key persons** include current and former persons who meet the above definition of key person.

An **associated entity** for a residential property developer that is a corporation is a related corporation, or an entity prescribed by regulation. This regulation making power has been included to allow for other entities to be prescribed in the event that there is a shift in Government policy or the operation of residential property developers and the other entities that they are connected to. This is not intended to capture a wider range of entities than is necessary for the registrar to make a determination about granting a licence. Any entities prescribed by regulation will require a human rights compatibility statement before the regulation is made.

The analysis of human rights compatibility below relates to both individual applicants or licensees and individuals who are key persons or former key persons or are individuals that may otherwise have their human rights engaged through the licensing scheme.

### ***Rights Limited***

#### **Right to Work and Other Related Work Rights**

The introduction of the property developer licensing scheme may affect the right to work (section 27B (1) of the HRA) and may limit this right by restricting access to carrying on a business as a residential property developer, which has not previously required a licence or ongoing regulatory compliance as set out in this Bill. As this Bill will largely affect corporations, this analysis has been undertaken for those rare instances where an individual is licensed. The Bill also has the potential to engage this right in relation to key persons who are individuals.

#### ***Nature of the right and the limitation (s28(a) and (c))***

Part 3 of the Bill requires individuals and corporations carrying on a business as a residential property developer to be licensed. Licences have a maximum term of 7 years and will need to be renewed prior to the end of the licensing term if the person wishes to continue as a residential property developer in the ACT. Once a residential property developer is licensed, they must meet ongoing licence conditions and may

be subject to regulatory action, including suspension or cancellation of their licence, if they fail to do so.

Key components of the licensing scheme established by this Bill that engage the right to work are:

- Eligibility for registration and renewal requires an individual to meet the suitability criteria established in clause 13 of the Bill. These criteria have been drafted to assist the Registrar in determining capacity to engage in residential development activity. These criteria also apply to key persons and former key persons for a corporation that is seeking to be licensed.
- A requirement for the applicant to provide access to a rating report from a regulated ratings agency where the Registrar has implemented processes that require such a report to be provided with an application for registration or renewal. An unfavourable rating report which identifies a risk to the community and or the territory may reduce the likelihood of an individual or corporation being granted a licence or may provide grounds for conditions to be placed on that licence in order to reduce that risk.
- For renewal of licenses, a requirement, at the discretion of the Registrar, for licensees to undertake competency requirements during the term of their licence.
- The ability of the Registrar to impose conditions on licenses.
- Registrar powers in relation to regulatory action.

Under Part 5 of the Bill, the Registrar has the power to:

- take regulatory action against licensed or former licensed property developers, which includes:
  - reprimanding the licensee;
  - directing the licensee to undergo an assessment of the licensee's required qualifications, experience and competencies, or their operational and financial capacity to carry on a business as a property developer, including providing an additional rating report;
  - directing the licensee to undertake stated training;
  - imposing, or amending, a condition of their licence;
  - suspending their licence for either a fixed period or until a particular event happens;
  - cancelling their licence.
- immediately suspending or cancelling a licence where a ground for regulatory action exists and it is in the public interest to immediately suspend or cancel the licence
- apply to ACAT for an order disqualifying a licensed or formerly licensed entity

### *Suitability requirements*

The Bill imposes eligibility criteria on licensees which includes a suitable person test. In determining whether an applicant and associated key persons are suitable persons, the Property Developer Registrar will consider:

- the applicant's\* character, including, for example, the applicant's honesty, integrity and professionalism. This will only capture matters that are relevant to a person's ability to competently undertake residential property development activity, for example being charged and convicted of industrial manslaughter or being disqualified from being a company director by the Australian Securities and Investments Commission.
- the applicant's\* history of compliance, or ability to comply, with relevant laws, including whether the applicant has been:
  - the subject of a regulatory action under a relevant law; or
  - convicted of an offence against a relevant law or another law that affects the applicant's suitability to carry on a business as a property developer.

**Note:** Relevant laws include:

(a) the *Building Act 2004*, which supports residential construction activity in the ACT;

(b) the *Building and Construction Industry (Security of Payment) Act 2009*, which provides the right to claim progress payments, sets up procedures for claiming and disputing progress payments and provides a rapid adjudication system to determine payment disputes for subcontractors in the building and construction industry;

(c) the *Civil Law (Sale of Residential Property) Act 2003*, which governs the sale of residential property;

(d) the *Construction Occupations (Licensing) Act 2004*, which provides the framework for licensing construction occupations;

(e) *Corporations Act 2001* (Cwlth) (Corporations Act), which governs the operation of all corporations in Australia;

(f) the *Fair Work Act 2009* (Cwlth), which provides for workplace relations laws in Australia;

(g) the *Planning Act 2023*, which creates the framework for an effective, efficient, accessible and enabling planning system in the ACT;

(h) the *Unit Titles (Management) Act 2011*, which makes it clear who is responsible for managing units plans, helps people who manage units plans to exercise their functions, and assists in the resolution of disputes in relation to the management of units plans;

(i) the *Work Health and Safety Act 2011*, which provides for a balanced and nationally consistent framework to secure the health and safety of workers and workplaces;

(j) any other law prescribed by regulation.

- the applicant's\* operational and financial capacity to carry on a business as a property developer, including the applicant's past performance in undertaking property development or other related activities and their credit history and financial viability. Matters such as an applicant's credit history will only be considered in so far as they are relevant to granting a licence.
- the applicant's\* compliance with any competency requirement.

- whether the applicant\* has previously held a licence that has been cancelled or suspended, or for which conditions have been imposed on the licence by the registrar.
- whether the applicant\* has been an insolvent under administration under the Corporations Act, section 9.
- whether a corporation has been placed into administration, receivership or liquidation while the applicant was an executive officer of the corporation.
- whether the applicant\* has been disqualified from managing a corporation under the Corporations Act.

\* If the applicant is a corporation, the registrar may also consider the above matters for an associated entity or key person for the corporation, as well as a former associated entity or key person.

### *Key persons*

In limited circumstances it could also be argued that this right may be limited through the assessment of key persons when determining whether to issue a licence. If a licence is not granted, it may impact a person's right to work with a particular organisation or on a particular project, but it will not impact on their right to work on other projects or with other corporate entities.

Former key persons may have their right to work limited by this Bill in the following circumstances:

- a licence is not granted because a current or former key person is not a suitable person and that fact is relevant to whether the licence applicant is suitable to be a licensed, residential property developer in the ACT. For example, the key person is disqualified from being a company director.
- their name is published on the public register which includes information about former key persons of a licensed property developer. The information contained on the public register in relation to former key persons only includes names for former directors for the licensee and associated entities for the licensee. It will not include information about former key persons who are not a former key person as a result of being a current or former director and will not include information beyond their name.

### ***Legitimate purpose (s28 (b))***

The legitimate objective of the Bill is to promote good property development outcomes, increase community confidence in the property development sector, and protect consumers from poor building quality and unsafe buildings.

The Bill will:

- promote best practice across the property development sector in the ACT by establishing a licensing scheme for property developers that protects the public by ensuring that residential development activities are carried out by people with the appropriate skills and capacity;
- make property developers accountable for decisions and actions over which they have control;

- ensure that property developers that lack the capacity to capably undertake development work, including those with close associates or key persons that are unsuitable, are not able to carry on a business as a property developer in the ACT;
- improve outcomes for building owners and occupants through a transparent and accountable property development industry; and
- positively impact on the economic sustainability of the property development sector in the ACT.

***Rational connection between the limitation and the purpose (s28 (d))***

The new licensing scheme will assist in protecting the community from adverse outcomes associated with property development activities.

The Bill does this by creating a licensing scheme with the following features:

- eligibility criteria for licensing and renewal which require the registrar to consider factors relevant to the objectives of the Bill
- providing for the imposition of conditions on an licence allowing the registrar to oversight property development activities and deliver on the objectives of the Bill
- regulatory action against licensed and former licensed property developers to ensure regulatory oversight and to deliver on the objectives of the Bill.

Despite the fundamental role that residential property developers play in the development of residential dwellings and buildings that contain residential dwellings, including acquiring land, finance, engaging design professionals, and engaging a principal builder for a project, they do not currently require a licence to operate, nor are they subject to a regulatory regime tailored to the type of activities they engage in.

Residential property development is a significant economic driver in the ACT, and many types of individuals and businesses enter into business arrangements with property developers. The purchase of a home is also one of, if not the, biggest financial investment that an individual will make. It is important to make sure that people who engage with residential property developers can be sure that they will be competent.

The licensing scheme established by this Bill supports a residential property developer industry that consists of competent members who will act ethically and be subject to sanctions if they fail to do so.

***Proportionality (s28 (e))***

Section 27B (1) of the HRA expressly provides that the practice of a trade, occupation or profession may be regulated by law.

The licensing scheme established by this Bill has been designed to be the least restrictive approach to achieving the objectives of the Bill and has sufficient

safeguards to ensure the limitation on the right to work can be considered reasonable and justifiable.

The licensing scheme established by the Bill will not require all persons engaged in residential property development to be licensed and thus does not prohibit any person from undertaking property development activities unless they meet the threshold requirements for the licensing scheme. This is different to other occupational licensing schemes in the ACT that prohibit a person from providing specific services if they not licensed.

Specific safeguards in the licensing scheme include:

- if the applicant is eligible for licensing, the registrar must issue a licence.
- a decision to refuse to grant a licence or place conditions on a licence, can be internally reviewed by the applicant
- before imposing conditions on a licence, the registrar must give the applicant written notice, including reasons for the proposed conditions and provide the applicant with an opportunity to respond to the notice and the registrar must take into consideration any response provided. A decision to impose conditions is internally reviewable.
- ACAT can also confirm, vary or set aside internally reviewable decisions

In developing the Bill, extensive consultation was undertaken, and there was strong community support for the establishment of an effective licensing scheme for property developers.

Consistent with the goals of increasing transparency and accessibility, information about the licensing process and whether an individual or entity needs a licence, will be available on the Territory Planning Authority's website and the Access Canberra website. Further, information will be provided at appropriate times during the residential property development process. For example, when selling or advertising the sale of off-the-plan residential property or when seeking a development approval, applying for a building approval, building commencement notice or certificate of occupancy in relation to certain residential building developments. Development applications or building approval applications will include information that will allow applicants to determine whether they require a licence or are exempt.

There is a high expectation that licensed residential property developers will exercise appropriate skill and care when carrying on property development activities, and it is important that this standard is enforced through appropriate regulatory settings to protect the community and deter unsafe behaviours.

Persons covered by regulatory frameworks are provided with adequate information about their obligations under those frameworks. Appropriate regulatory actions are essential to building community confidence in the property development sector.

### *Suitability information*

Collecting suitability information that establishes a property developer's competencies and capabilities is necessary to determine whether they are suitable to

be licensed and applies to individual applicants as well as current or former key persons of a corporate applicant. The information sought is limited to information that is necessary for and relevant to the determination of applications and any subsequent assessment, for example to impose or remove conditions on a licence, or if a licensee's circumstances change, prompting a reassessment or review during the term of a licence.

Suitability information does not automatically exclude an applicant from being licensed. The registrar is given broad discretion to satisfy themselves of an applicant's suitability to be licensed. The registrar can request further information to help inform this decision (section 19).

In circumstances where a licence is denied, or given conditional approval, this could result in an impact on a project proceeding and thus on the right to work. This is a reasonable and proportionate measure to meet the objectives of the Bill.

The requirement for the Registrar to consider the criteria outlined in the Bill for the purposes of assessing whether a person is a suitable person to be issued with a property developer licence is consistent with the purposes of establishing the licensing scheme, namely to effectively regulate property developers by ensuring that no unsuitable persons are granted licences or continue to be licensed. The information obtained in establishing the suitability of an applicant is important in establishing applicants have the commercial acumen (strategic and financial oversight) that is required to be licensed.

The elements of the suitability criteria were carefully assessed, and were chosen to enable a sufficient level of information on which to base a licensing decision, without imposing an undue burden on applicants or seeking information that is not relevant.

The matters the registrar may consider when determining whether a person is suitable to be licensed as a property developer are consistent with criteria employed in other licensing schemes where the licensee may conduct activities that pose particularly high risks to consumers if they are carried out by people and entities that do not have the skills and competencies necessary. A comparable licensing scheme is the Australian Financial Services Licence, which is administered by the Australian Securities and Investments Corporation (ASIC) where ASIC must be satisfied that an applicant has sufficient experience and ability, and is a fit and proper person to be registered.

The Registrar has discretion in determining whether information obtained makes a person suitable or not suitable to be licensed as a property developer. Specifically, the Bill provides that the Registrar is not prohibited from licensing a person who discloses potentially negative suitability information.

A decision to refuse to consider an application for a licence, or to grant a licence, is internally reviewable, and can also be reviewed by the ACAT.

### *Regulatory Action*

The Bill establishes the grounds on which the Registrar can take regulatory action and the processes that are to be followed to provide procedural fairness (for example, providing show cause notices prior to taking any regulatory action). Where regulatory action is necessary, the mechanism chosen will be dependent on the specific circumstances of the grounds for regulatory action.

Immediate regulatory action including suspension or cancellation powers are limited and can only be taken when the Registrar is satisfied that a ground for regulatory action exists, and it is in the public interest to immediately suspend or cancel the property developer's licence. For example, where there is risk of harm. Where there is immediate risk of safety to any person, the Registrar may inform the licensee of the immediate suspension initially orally and then follow it up with a written notice, otherwise notice must be provided in writing.

An immediate suspension ends:

- on the date stated in an immediate action notice, if the Registrar has suspended the licence for a fixed period;
- when a particular event happens, if that was a condition of suspension;
- when regulatory action takes effect, if regulatory action was taken;
- where regulatory action against a licensee is not taken:
  - when the Registrar gives written notice that regulatory action will not be taken; or
  - 90 days after the immediate suspension notice is given to the licensee; or
  - if the Registrar revokes the suspension or cancellation.

Procedural fairness safeguards are provided throughout Part 5 of the Bill and decisions relating to regulatory action and/or immediate suspension or cancellation of a licence are reviewable by ACAT.

To ensure procedural fairness, a licensee must be given a show cause notice if the Registrar proposes to take regulatory action which states the grounds on which the Registrar considers regulatory action can be taken; details of the proposed regulatory action and provide the licensee with 28 days to respond to the notice. The Registrar must consider any response to the notice in making their decision to take regulatory action. In addition, suspension or cancellation of a licence must not take place until at least 14 days after the notice of regulatory action is given to the licensee.

Non-compliance with the regulatory framework established by the Bill will be managed through an 'engage, educate and enforce' compliance process. This provides a safeguard to ensure the limitation on rights is reasonable and proportionate. Conduct that contravenes the legislative framework will be considered on a case-by-case basis and within its own context to determine the appropriate compliance and enforcement response.

## Recognition and equality before the law

Section 8 of the HRA provides that everyone is entitled to equal and effective protection against discrimination, and to enjoy their human rights without discrimination. In establishing the licensing scheme in the Bill, the approach has been to limit any disproportionate impacts on any particular groups. However, in setting the eligibility criteria for licensing it was necessary to include requirements that could put some members of the community at a disadvantage.

### ***Nature of the right and the limitation (s28(a) and (c))***

The Bill may limit the right to recognition and equality before the law. Not all differential treatment is protected under the right, but discrimination on the basis of a 'prohibited ground' engages and limits this right. An 'irrelevant criminal record' can be considered a prohibited ground.

The Bill includes eligibility criteria for a property developer licence which includes an assessment of whether the applicant and any key persons (including former key person) are suitable persons.

Suitability information includes several considerations (see discussion on the right to work and right to privacy and reputation), including consideration of the convictions of offences against the Bill or a relevant law or another law that affects the applicant's suitability to undertake residential development activities. Relevant laws (as defined under the right to work assessment) includes laws that impose criminal convictions. Part 4 of the Bill provides that the director-general may approve a rating entity to prepare rating reports on applicants for a property developer licence and sets out the conditions that must be met by a rating entity. The report will include a suitable person background check which includes a review of disciplinary or regulatory actions, court, and tribunal records that identify compliance and criminal history, including money laundering. This information is obtained directly from existing official sources including government data sets.

Suitability information of the type described may engage the right to equality if it permits the consideration of an irrelevant criminal record in determining whether to grant a licence.

### ***Legitimate purpose (s28 (b))***

The legitimate objective of the Bill is to promote good property development outcomes, increase community confidence in the property development sector, and protect consumers from poor building quality and unsafe buildings.

The Bill will:

- promote best practice across the property development sector in the ACT by establishing a licensing scheme for property developers that protects the public by ensuring that residential development activities are carried out by people with the appropriate skills and capacity;
- make property developers accountable for decisions and actions over which they have control;

- ensure that property developers that lack the capacity to capably undertake development work, including those with close associates or key persons that are unsuitable, are not able to carry on a business as a property developer in the ACT;
- improve outcomes for building owners and occupants through a transparent and accountable property development industry; and
- positively impact on the economic sustainability of the property development sector in the ACT.

***Rational connection between the limitation and the purpose (s28 (d))***

Eligibility criteria, including suitability assessments for licensees and key persons support the purpose of the Bill. Consideration of previous criminal history is targeted at serious offences and offences related to the objectives of the Bill. The offences included in the definition of *suitability information* are consistent with the objectives of the Bill, specifically the effective regulation of property developers and ensuring that no unsuitable persons are granted licences or continue to be licensed.

***Proportionality (s28 (e))***

The matters the registrar may consider when determining whether a person is suitable to be licensed as a property developer are consistent with criteria employed in other licensing schemes where the licensee may conduct activities that pose particularly high risks to consumers if they are carried out by people and entities that do not have the necessary skills and competencies.

The registrar has discretion in determining whether *suitability information* obtained makes an applicant suitable or unsuitable to be licensed as a property developer. Specifically, the Bill provides that the Registrar is not prohibited from licensing an applicant who discloses potentially negative *suitability information*.

A further safeguard is that a decision to refuse to grant a licence, can be internally reviewed and the applicant may then also seek review of the reviewed decision by the ACAT.

**Right to Privacy and Reputation**

The right to privacy under section 12 of the HRA protects people in the ACT from ‘unlawful’ interference with their privacy. This means that no interference can take place except in cases authorised by law.

The right to privacy also protects against arbitrary interference relating to an individual, an individual’s family, home or correspondence, even when authorised by law. Such interference should be in accordance with the provisions, aims and objectives of the HRA and be reasonable in the particular circumstances. Arbitrary interference in someone’s private or family life is interference that may be lawful, but

is unreasonable, unnecessary and the degree of interference is not proportionate to the need.

The protection of privacy is necessarily relative, and personal information should only be collected where it is in the interests of the community. The right to privacy is therefore not absolute and may be reasonably limited by laws which can be demonstrably justified in a free and democratic society.

### ***Nature of the right and the limitation (s28(a) and (c))***

The Bill limits the right to privacy and reputation in several instances. The Bill engages the right to privacy at a broad level by establishing a licensing scheme where none currently exists and will now require certain residential property developers to become licensed in order to carry on a business as a property developer.

Specific elements of the licensing scheme that collect, use, store and/or disclose personal and sensitive information include:

1. Consideration of suitability information\* about an individual applying for licensing or renewal.
2. Consideration of suitability information\* about a corporation applying for licensing or renewal, including the suitability of key persons for the corporation or former key persons for the corporation.
3. Requiring an applicant for licensing or renewal or in response to regulatory action to provide a ratings report from an approved ratings agency.
4. Establishment of a register of licensed property developers
5. Establishment of a public register of licensed property developers (current and former), which will include the names of individual licensees and the names of current and former directors for a corporation, any conditions on the licence, and the details of any regulatory action taken against them.
6. Providing authorised persons with power of entry to premises, to inspect and copy documents, seize things, restrict access to things, to direct a person to give information, to direct a person to give their name and address, to take measurements or samples and inspect and copy documents.
7. Providing the registrar with powers to access personal information to undertake assessment of complaints (Part 9) and regulatory action (clause 38).
8. Providing for the sharing of *public safety information* with a *public safety agency* (Part 10).

\*see discussion of *suitability information* in the right to work assessment above

Part 3 of the Bill sets out the process for obtaining a licence as a property developer, as well as for renewal. An application must be accompanied by prescribed information including suitability information and in most circumstances, a ratings report from an approved ratings agency,

Details of *suitability information* is contained in the right to work assessment.

Suitability information for corporations applying for a property developer licence can affect individuals that are associated with the corporation. The registrar may consider *suitability information* for individuals who are current and/or former key persons within the corporation that is applying for a property developer licence.

Additional relevant suitability information may be prescribed by regulation. This provides for the consideration of relevant suitability information that may be required to support a decision to grant a licence in the future in order to respond to emerging issues or behaviours in the industry.

The Bill also provides that the Registrar may require applicants to include as part of their application a rating report prepared by a rating entity. Rating entities that provide a ratings report must hold an Australian financial services licence as provided for in section 9 of the Corporations Act. Part 4 of the Bill provides that the director-general may approve a rating entity to prepare rating reports on applicants for a property developer licence and sets out the conditions that must be met by a rating entity. Property developers seeking a ratings report may have to provide information about their financial and other business arrangements to the ratings agency, as well as information about associated entities and key people. A ratings report will include suitable person checks which will include a review of disciplinary or regulatory actions, court, and tribunal records that identify compliance and criminal history, including money laundering. This information is obtained by ratings agency through existing official sources including government data sets.

### ***Legitimate purpose (s28 (b))***

The legitimate objective of the Bill is to promote good property development outcomes, increase community confidence in the property development sector, and protect consumers from poor building quality and unsafe buildings.

The Bill will:

- promote best practice across the property development sector in the ACT by establishing a licensing scheme for property developers that protects the public by ensuring that residential development activities are carried out by people with the appropriate skills and capacity;
- make property developers accountable for decisions and actions over which they have control;
- ensure that property developers that lack the capacity to capably undertake development work, including those with close associates or key persons that are unsuitable, are not able to carry on a business as a property developer in the ACT;
- improve outcomes for building owners and occupants through a transparent and accountable property development industry; and

- positively impact on the economic sustainability of the property development sector in the ACT.

***Rational connection between the limitation and the purpose (s28 (d))***

All provisions in the Bill that include the collection, use and disclosure of personal information are directly linked to achieving the objectives of the Bill.

*Suitability information*

Collecting suitability information that establishes a property developer’s competencies and capabilities is necessary to determine whether they are suitable to be licensed and applies to individual applicants as well as current or former key persons of a corporate applicant. The information sought is limited to information that is necessary for and relevant to the determination of applications and any subsequent assessment, for example to impose or remove conditions on a licence, or if a licensee’s circumstances change, prompting a reassessment or review during the term of a licence.

Suitability information for former key people will only be considered if necessary for making a determination when issuing a licence. It may be relevant to consider former key people in instances where they may have influenced the structure or culture of a corporation in a way that materially impacts on the applicant’s suitability to be issued with a licence.

*Register*

The Bill establishes a public register that includes the name of a property developer where an individual is licensed, or the names of current and former directors where a property developer is licensed as a corporation, along with details of any conditions that have been imposed on their licence and information about regulatory action taken against the licensee. Publishing details about licensed and former licensed property developers allows members of the public and industry to access information required to enable them to make informed choices when entering a relationship with a property developer.

*Enforcement powers*

The Bill provides authorised persons with powers of entry to premises, to inspect and copy documents, seize things, restrict access to things, to direct a person to give information, to direct a person to give their name and address, to take measurements or samples and inspect and copy documents. This allows for the effective enforcement of the Bill, particularly to support:

- investigation of offences against the Bill;
- consideration of regulatory action;
- investigation of complaints made to the registrar.

*Information sharing provisions*

The information sharing provisions in Part 10 are necessary to protect the community, consumers and industry from a situation that presents, or is likely to present, a risk of injury to a person, significant harm to the environment or significant damage to property..

### ***Proportionality (s28 (e))***

Disclosure of personal information provided in the Bill is limited to the minimal requirements that are relevant and needed to assess a licence application, conduct enforcement, and provide the public with information about licensed property developers.

Individuals seeking to obtain a property developer licence will be informed about the process at the time they apply. They will give their consent to their information being checked. Much of the information required is publicly available, for example records of insolvency. Should they be granted a licence, they will accept the obligations placed on them as licensed property developers, and accept that for the licensing scheme to operate there will need to be ongoing collection, use, disclosure and storage of relevant personal information.

For corporations, information about key persons and former key persons that is required as part of an application will allow the registrar to assess their history of compliance with relevant legislation and regulatory regimes, and necessary to assess their capacity and capability to deliver quality buildings. The absence of formal qualifications for property developers, the complex company structures used by property developers, and the movement of people across the sector means that it is necessary to consider the current and past performance of key persons involved in property development activities in order to make an assessment of a corporation's suitability to undertake those activities. The information sought about former directors will largely be publicly available, and retained for public interest purposes.

The limitation on the right to privacy during the licence application process for individuals applying for a licence and key persons and former key persons for corporations applying for a licence is justified because this is the minimum information required for the registrar to make an informed determination of an applicant's suitability to be licensed. If this level of information is not obtained by the registrar they are unable to make a thorough assessment of the applicant's suitability to be licensed. The financial disclosure requirement is important because it provides the registrar with an understanding of the applicant's capacity and capability to construct developments that comply with this Bill, statutory obligations and the ACT's building regulatory system.

These powers impose a reasonable and proportionate limitation on the right to privacy. Any less restrictive means, namely not having these powers, would compromise the effectiveness of the licensing scheme.

### Suitability information

The considerations that the registrar must take into account about the suitability of an applicant do not automatically exclude an applicant from registration. The registrar is given broad discretion to satisfy themselves of an applicant's suitability to be registered. Further the considerations the registrar must take into account must be specifically relevant.

### Ratings report

The information required to be disclosed is necessary to effectively prepare a rating report that assesses the operational and financial capacity of the applicant or licensee to carry on a business as a property developer. The Bill specifies that to be approved as a rating entity, the entity must hold an Australian financial services licence that authorises it to provide a rating. These licences require licensees to ensure strict requirements are met regarding privacy and handling of personal and sensitive information.

### Register

The information that is required to be available on the public register of property developers is limited to the minimum information required to enable consumers and industry to make informed decisions about whether to engage with a particular property developer. The particulars which are to be included in the public register are prescribed in the Bill and will be included in information material about the scheme so this will be a known condition of any individual or corporation seeking to be licensed as a property developer.

The collection and publication of information on the register is necessary for and tailored to ensure compliance with the licensing scheme, promote transparency and protect consumers, and accordingly does not constitute an arbitrary interference with privacy. The register will enable consumers to check details of licensed property developers, including conditions on their licence and any regulatory action taken against them.

Information on the register in relation to former licensed property developers will be removed 10 years after the day the former licensed property developer's licence ends. This is consistent with the requirements for professional engineers and construction occupation licensees. The register will not contain information about former key people.

A further safeguard is that the registrar must not make information about a property developer or former property developer available to the public if requested by the property developer or former property developer and the registrar is satisfied that the publication of the information would, or could reasonably be expected to, endanger the life or physical safety of any person; or jeopardise national security.

### Enforcement powers

Powers of entry to premises and powers to obtain, inspect and copy documents, seize things or restrict access to things are limited to authorised persons who are appointed by the registrar and these powers can only be exercised in respect to a purpose connected to the scheme established by the Bill. These powers are a necessary feature of any compliance and enforcement regime and are consistent with those contained in other schemes in the ACT (for example, *Construction Occupations (Licensing) Act 2004*; *Architects Act 2004*, *Professional Engineers Act 2023*). The powers contained in the Bill for authorised persons are only those considered necessary for the effective regulation of the scheme established by the Bill.

These powers will only be used in relation to investigations relating to regulatory action and offences under the Bill (for example, failing to comply with a rectification order).

Further specific safeguards include:

- The power to require people to give information, a document, or other thing is limited to that which is reasonably required to exercise a function under the Bill.
- The power to require people to provide their name and home address is limited to circumstances where an authorised person has reasonable grounds to believe that a person may be involved in an offence against the Bill, or could assist in the investigation of an offence against the Bill.
- The power to enter premises is restricted to public areas, or when the occupier consents, or to monitor compliance under this Bill or if the authorised person believes an offence against the Bill has, is being, or is likely to be, committed at the premises.
- Entry to premises that are being used for residential purposes is not permitted without the occupant's consent, unless in accordance with a warrant.

Additionally, if an authorised person exercises powers such as requesting information or entry to premises, they must first identify themselves, tell the affected person the reason for exercising the power, and tell the affected person about any relevant offence in relation to the power (Part 7).

#### Information sharing provisions

Information sharing provisions in Division 10.1 of Part 10 are limited to public safety information and sharing of that information between public safety agencies. Public safety information is defined as information in relation to a situation that presents, or is likely to present, a risk of death or injury to a person, significant harm to the environment or significant damage to property, that is disclosed to, or obtained by, a public safety agency because the agency is, or has been, a public safety agency.

These information sharing provisions are intended to allow significant safety risks that come to the attention of the registrar to be passed on to the public safety agency that has the appropriate and relevant functions and powers, to address the risk.

It is necessary for the Bill to include these information sharing provisions, noting the potential significant risks to health, safety and the economic wellbeing of individuals and the broader community resulting from residential development activity.

### Right to Freedom of Expression

Section 16 of the HRA provides that everyone has the right to hold opinions without interference and the right to freedom of expression. The right to freedom of expression includes the freedom to seek, receive and impart information and ideas of all kinds, orally, in writing, in print, by way of art or in any other way a person chooses.

### ***Nature of the right and the limitation (s28(a) and (c))***

The Bill may limit the right to freedom of expression through the creation of offences for making false or misleading representations about licensing status or in licensing applications.

The Bill introduces three offences relating to false or misleading representations about a licence.

The Bill makes it an offence to:

- make a false or misleading representation that the person is authorised under a licence to do residential development activity; and
- the representation is false or misleading in a material particular; and
- the person intended the representation to be false or misleading.

The Bill makes it an offence to:

- make a false or misleading representation that the person is authorised under a licence to do residential development activity; and
- the representation is false or misleading in a material particular; and
- the person is reckless about whether the representation is false or misleading.

The Bill makes it a strict liability offence to:

- make a false or misleading representation that the person is authorised under a licence to do residential development activity; and
- the representation is false or misleading in a material particular.

### ***Legitimate purpose (s28 (b))***

The legitimate objective of the Bill is to promote good property development outcomes, increase community confidence in the property development sector, and protect consumers from poor building quality and unsafe buildings.

The Bill will:

- promote best practice across the property development sector in the ACT by establishing a licensing scheme for property developers that protects the

public by ensuring that residential development activities are carried out by people with the appropriate skills and capacity;

- make property developers accountable for decisions and actions over which they have control;
- ensure that property developers that lack the capacity to capably undertake development work, including those with close associates or key persons that are unsuitable, are not able to carry on a business as a property developer in the ACT;
- improve outcomes for building owners and occupants through a transparent and accountable property development industry; and
- positively impact on the economic sustainability of the property development sector in the ACT.

### ***Rational connection between the limitation and the purpose (s28 (d))***

These offences are a consumer protection measure and are directly related to the objectives of the Bill. These provisions aim to protect consumers from being misled as to the licensing status, and, by extension, the capacity and capability of a property developer, and so are necessary for the protection of the public.

### ***Proportionality (s28 (e))***

These offences and the associated penalties are consistent with the ACT Guide for Framing Offences and are considered proportionate to the purpose of the Bill.

These offences are limited to false or misleading representations about material particulars related to the person's licensing as a property developer.

The scope of matters related to licensing are clearly articulated in the Bill.

These offences do not prevent a licensed property developer or key people from expressing opinions about the scheme or about another licensed property developer and their products.

Chapter 2 of the Criminal Code applies to all offences under this Act. There is a specific defence of mistake of fact for strict liability offences (section 23 Criminal Code 2002), which preserves the principle that a person is innocent until proven guilty, is available in response to the strict liability offences. Section 23 (3) of the Code makes it clear that other defences may also be available for strict liability offences, including the defence of intervening conduct or event (section 39), duress (section 40), sudden or extraordinary emergency (section 41), self-defence (section 42) or lawful authority (section 43).

It is not considered that there is a less restrictive means to achieve this consumer protection measure. The consequences of committing these offences could result in serious consequences for the community and consumers arising from misleading behaviour by some individuals or entities that devalues the licensing scheme in the eyes of the community and does not achieve the objectives of the scheme to build consumer confidence in the property developer industry in the ACT.

## Right to Liberty and Security of a Person

Everyone has the right to liberty and security of person, in particular, no-one may be arbitrarily arrested or detained or deprived of their liberty except on the grounds and in accordance with the procedures established by law.

This right can be relevant any time a person is not free to leave a place by their own choice. This includes the detention of a person.

### ***Nature of the right and the limitation (s28(a) and (c))***

This Bill engages the right to liberty and security of person through the creation of two offences which have a maximum penalty attached which includes a term of imprisonment. These offences (clauses 115 (1) and 115 (2)) relate to using or divulging protected information (Division 10.2), and each carry a maximum term of imprisonment of 6 months.

### ***Legitimate purpose (s28 (b))***

The legitimate objective of the Bill is to promote good property development outcomes, increase community confidence in the property development sector, and protect consumers from poor building quality and unsafe buildings.

The Bill will:

- promote best practice across the property development sector in the ACT by establishing a licensing scheme for property developers that protects the public by ensuring that residential development activities are carried out by people with the appropriate skills and capacity;
- make property developers accountable for decisions and actions over which they have control;
- ensure that property developers that lack the capacity to capably undertake development work, including those with close associates or key persons that are unsuitable, are not able to carry on a business as a property developer in the ACT;
- improve outcomes for building owners and occupants through a transparent and accountable property development industry; and
- positively impact on the economic sustainability of the property development sector in the ACT.

### ***Rational connection between the limitation and the purpose (s28 (d))***

The offences are designed to protect those who provide *protected information* under the ACT for having it unreasonably used or disclosed. Protected information is information about a person that is disclosed to, or obtained by, a public official in the course of exercising a function under this Bill.

Maximum penalties that include a term of imprisonment are intended to deter people from divulging protected information. This approach is similar to other recent ACT legislation including the *Professional Engineers Act 2023* and the existing

Commonwealth *Corporations Act 2001* which has imprisonment terms for up to 15 years for serious Corporations Act offences.

### ***Proportionality (s28 (e))***

The term of imprisonment for the above offences is a maximum penalty and is an option not a mandatory penalty. The use or disclosure of protected information is serious enough to warrant a maximum penalty of imprisonment.

The court will have discretion to consider all the circumstances of the case to determine whether a term of imprisonment or a court fine is most appropriate. Although a lesser term of imprisonment or none may be considered a less restrictive means to address offending behaviour, this would be inconsistent with identical offences in other Territory laws for similar regulatory frameworks. Accordingly, the proposed penalties are not considered excessive or disproportionate.

The ratio of 6 months imprisonment and/or 50 penalty units is also consistent with the ratio for maximum penalty units to imprisonment terms in the *ACT Guide for Framing Offences*. The term of imprisonment is also discretionary and reasonable considering the offences are limited to using or divulging protected information in specified circumstances.

Safeguards in place for these offences include it does not apply where the information is used or divulged under law; in relation to the exercise of a function by a public official under the Bill or another Territory law; in a court proceeding or with the person's consent.

The ACT Government is committed to having in place a robust and proportionate regulatory framework for property developers. These offences contain penalties that protect the information collected through various powers in the Bill while enabling the information collected to be used for legitimate and reasonable purposes.

### **Right to a fair trial**

The right to a fair trial is protected by section 21 of the HRA. Section 21 protects the right to procedural fairness, and can also extend to protect third parties whose substantive legal rights may be affected by a determination, for example by a decision of the registrar to immediately suspend or cancel a property developer licence.

### ***Nature of the right and the limitation (s28(a) and (c))***

Division 6.2 of the Bill provides for the Registrar to immediately suspend or cancel a property developer licence without providing advance notice and the right of response.

Part 5 of the Bill provides for the Registrar with the regulatory powers to suspend or cancel a licence.

### ***Legitimate purpose (s28 (b))***

The legitimate objective of the Bill is to promote good property development outcomes, increase community confidence in the property development sector, and protect consumers from poor building quality and unsafe buildings.

The Bill will:

- promote best practice across the property development sector in the ACT by establishing a licensing scheme for property developers that protects the public by ensuring that residential development activities are carried out by people with the appropriate skills and capacity;
- make property developers accountable for decisions and actions over which they have control;
- ensure that property developers that lack the capacity to capably undertake development work, including those with close associates or key persons that are unsuitable, are not able to carry on a business as a property developer in the ACT;
- improve outcomes for building owners and occupants through a transparent and accountable property development industry; and
- positively impact on the economic sustainability of the property development sector in the ACT.

#### ***Rational connection between the limitation and the purpose (s28 (d))***

The registrar can only immediately suspend or cancel a licence if satisfied that a prescribed ground for regulatory actions exists in relation to a licensee and it is in the public interest to immediately suspend or cancel a licence.

These powers support the objectives of the Bill by providing the registrar with the ability to respond appropriately in situations where there is an immediate risk to safety of a person or other serious circumstances that it is in the public interest to address immediately.

#### ***Proportionality (s28 (e))***

This provision is only intended to be used in serious circumstances where immediate action is necessary in the public interest, for example, there is an immediate risk to the safety of a person or risk of harm. Where there is immediate risk of safety to any person, the registrar may inform the licensee of the immediate suspension initially orally and then follow it up with a written notice.

Safeguards include:

- allowing an affected licensee to make an application to the registrar to revoke the suspension or cancellation (s43);
- ending the suspension when the registrar advises that regulatory action will not be taken against the licensee following a suspension of a licence (s41(7)(b)(ii));
- the suspension ends after 90 days, or earlier if the registrar revokes the suspension;

- a decision to immediately suspend or cancel a licence is reviewable by ACAT;
- decisions by the registrar to refuse to revoke immediate suspension or cancellation of a licence (clause 43) are ACAT reviewable.

The ACT Government is committed to having in place a robust and proportionate regulatory framework that is able to respond to serious breaches of this Bill or to protect the public interest where other regulatory options do not exist or are insufficient.

### Rights in Criminal proceedings – strict liability offences

Section 22 (1) of the HRA provides that everyone charged with a criminal offence has the right to be presumed innocent until proven guilty according to law. The assessment below relates only to those strict liability offences related to the licensing scheme. Other strict liability offences created by the Bill are discussed under the section on the statutory chain of accountability.

#### ***Nature of the right and the limitation (s28(a) and (c))***

The Bill introduces new strict liability offences to support the effective operation of the scheme. Strict liability offences engage and may limit the right to be presumed innocent until proven guilty as they impose guilt without the need to prove the person's fault.

This Bill introduces several strict liability offences which will support the effective operation of the licensing including :

- Failure to notify the registrar about a prescribed change of circumstances within 14 days of the licensee becoming aware of the change (clause 27) (maximum penalty: 20 penalty units)
- Failure to comply with a rectification order (clause 57) (maximum penalty: 50 penalty units)
- Hindering or obstructing a Territory appointed authorised contractor doing rectification work (clause 59) (maximum penalty: 50 penalty units)
- Failure to comply with a stop work order (clause 64) (maximum penalty: 50 penalty units)
- Failure to comply with a compliance undertaking (clause 66) (maximum penalty: 50 penalty units)
- An authorised person does not return their identity card to the registrar in the required timeframe after the day they stop being an authorised person (clause 72) (maximum penalty: 1 penalty unit)
- A person does not give an authorised person their name and address when there are reasonable grounds and the person is directed to do so by an authorised person (clause 76) (maximum penalty: 5 penalty units)
- Interfering with the things seized by an authorised person without the approval of an authorised person (clause 91) (maximum penalty: 50 penalty units)
- Making a false or misleading representation that the person is authorised under a licence to do residential development activity and the representation

is false or misleading in a material particular (clause 97) (maximum penalty: 50 penalty units).

- Licensee fails to comply with a licence condition (clause 98) (maximum penalty: 50 penalty units)
- Licensee fails to comply with a requirement of an approved code of practice that applies to the licensee (clause 99) (maximum penalty: 50 penalty units)

Strict liability offences typically arise in a regulatory context where for reasons such as public safety and ensuring that regulatory schemes are complied with, criminal penalties are required. A defendant can reasonably be expected, because of their involvement with the regulated activity, to know what the requirements of the law are, and as such the mental, or fault, element can justifiably be excluded.

### ***Legitimate purpose (s28 (b))***

The legitimate objective of the Bill is to promote good property development outcomes, increase community confidence in the property development sector, and protect consumers from poor building quality and unsafe buildings.

The Bill will:

- promote best practice across the property development sector in the ACT by establishing a licensing scheme for property developers that protects the public by ensuring that residential development activities are carried out by people with the appropriate skills and capacity;
- make property developers accountable for decisions and actions over which they have control;
- ensure that property developers that lack the capacity to capably undertake development work, including those with close associates or key persons that are unsuitable, are not able to carry on a business as a property developer in the ACT;
- improve outcomes for building owners and occupants through a transparent and accountable property development industry; and
- positively impact on the economic sustainability of the property development sector in the ACT.

### ***Rational connection between the limitation and the purpose (s28 (d))***

The intention of the strict liability offences introduced by this Bill in relation to the licensing scheme are to support an effective licensing scheme including regulatory oversight of licensees. The purpose of the specific penalties attributable to these offences is to provide an appropriate disincentive to undertaking the actions subject to the offence provisions. These strict liability offences are also part of a scalable offence structure which includes offences that include the fault element of intention and/or recklessness.

As with many regulatory frameworks involving licensing, the inclusion of a suite of strict liability offences is considered important in deterring non-compliance. This

range of strict liability offences supports a regulatory framework that is intended to provide enhanced consumer protection outcomes for persons interacting with the property development industry.

These strict liability offences are designed to support the effective operation of the new licensing scheme as they target people engaging in behaviour that is not permitted. For a person to commit an offence under the Bill they would be required to be actively involved in the behaviour resulting in the offence and are on notice that the conduct they are engaging in is prohibited.

### ***Proportionality (s28 (e))***

The inclusion of strict liability offences in the Bill is necessary to deter individuals from engaging in activities that are inconsistent with the objects of the Bill and the obligations placed on licensed property developers. There are no less restrictive means available to effectively achieve this purpose.

The risk of inadvertent breach of these provisions is low. Persons covered by regulatory frameworks are provided with adequate information about their obligations under those frameworks and the provisions explicitly state the conduct that is required to commit the offence. Appropriate regulatory actions are essential to building community confidence in the property developer industry in the ACT and the supporting licensing and regulatory system.

There is a high expectation that licensed professionals will exercise appropriate skill and care when undertaking licensed activities and it is important that this standard is enforced through appropriate penalties to protect the community and deter unsafe behaviours.

The offences and penalties are consistent with the *ACT Guide for Framing Offences* and are considered proportionate to the purpose of the Bill. The maximum penalties attached to the offences reflect the seriousness of the offence relative to other offences in the Bill and other offences of a similar nature. They also reflect the level of responsibility the person committing the offence has for the conduct that will result in the offence being committed and the potential serious consequences that can arise for the community and consumers where there is non-compliance with the provisions.

Penalties created for the strict liability offence may include infringement notice penalties. Any infringement notice penalties will be established in a regulation under the *Magistrates Court Act 1930* (ACT). Infringement notices play an important role in effective regulatory frameworks by providing a deterrent to non-compliance and an alternative prosecution. Effective infringement notice schemes minimise the cost of litigation for the Territory while offering people a choice whether to accept a lesser penalty without admitting the offence or remaining liable to prosecution.

Any breaches of the offence framework will be managed through an 'engage, educate and enforce' compliance process. This provides a safeguard to ensure the limitation on rights is reasonable and proportionate. Should a breach occur, conduct that contravenes the legislative framework will be considered on a case-by-case basis and within its own context.

The strict liability offences introduced by this Bill are framed with clear criteria as to whether the offence has occurred. This means individuals can reasonably be aware they have an obligation under law.

An extensive communication and awareness campaign will be undertaken with the community and industry as part of implementation and commencement of the scheme.

The clear framing of offences, as well as strong communication around the obligations of individuals operating in the industry are important safeguards on individual rights and ensure the proportionality of introducing strict liability offences.

Chapter 2 of the Criminal Code applies to all offences under this Act. There is a specific defence of mistake of fact for strict liability offences (section 23 *Criminal Code 2002*), which preserves the principle that a person is innocent until proven guilty, is available in response to the strict liability offences. Section 23 (3) of the Code makes it clear that other defences may also be available for strict liability offences, including the defence of intervening conduct or event (section 39), duress (section 40), sudden or extraordinary emergency (section 41), self-defence (section 42) or lawful authority (section 43).

#### Rights in criminal proceedings- Reverse burden – evidentiary and disapplication of privilege against self-incrimination

Placing an evidentiary onus of proof on a defendant, instead of the prosecution, is known as an evidentiary reverse onus of proof. The starting point for the formulation of offences is that the prosecution has the evidentiary burden of proving the elements of the offence beyond reasonable doubt. The prosecution also has the task of negating any defences, exceptions or excuses raised by a defendant beyond reasonable doubt.

#### ***Nature of the right and the limitation (s28(a) and (c))***

Section 22 (1) of the HRA provides that everyone charged with a criminal offence has the right to be presumed innocent until proven guilty according to law. The presumption of innocence means that the prosecution has the burden of proving 'beyond reasonable doubt' that the accused committed the offence. A reverse evidential burden would engage and limit the presumption of innocence, as it requires a defendant to disprove a fact or provide evidence sufficient to raise a reasonable possibility that a matter exists or does not exist.

The Bill introduces the following offences that include a reverse evidential burden by placing an evidential burden on the defendant in relation to certain matters:

- Clause 72 – Identity cards – the defendant has the onus to prove that their identity card was lost, stolen or destroyed by someone else
- Clause 75 – Direction to give information – the defendant has the onus to prove that the authorised person did not comply with their requirements in clause 73 in giving the direction and that the authorised person did not explain the effect of the privilege against self-incrimination not applying (clause 74)
- Clause 76 – Direction to give name and address - the defendant has the onus to prove that the authorised person did not comply with their requirements in clause 73 in giving the direction
- Clause 79 – General powers on entry to premises – the defendant has the onus to prove that authorised person did not comply with their requirements in clause 73 in giving the direction and that the authorised person did not explain the effect of the privilege against self-incrimination not applying (clause 74)
- Clause 2.27 – new section 19AB of the *Civil Law (Sale of Residential Property Act) 2003* – the defendant has the onus of proving that the person is not subject to this section because they fall into one of the categories of persons listed.

The burden of proof remains on the prosecution to prove the other elements of the offences and on the prosecution in all other instances.

*Privilege against self-incrimination does not apply*

Section 22 of the HRA may be further limited by clause 74, which provides that a person is not excused from complying with a direction from an authorised person to give information, a document, or other thing on the ground that doing so may tend to incriminate the person or expose the person to a penalty.

Because this works to compel a person to give evidence and answer questions that may incriminate them, this may engage and limit section 22 of the HRA.

Clause 74 has been included to support authorised persons to conduct their enforcement activities. These functions require the gathering of relevant information, even if that information may incriminate the person giving it.

***Legitimate purpose (s28(b))***

The legitimate objective of the Bill is to promote good property development outcomes, increase community confidence in the property development sector, and protect consumers from poor building quality and unsafe buildings.

The Bill will:

- promote best practice across the property development sector in the ACT by establishing a licensing scheme for property developers that protects the public by ensuring that residential development activities are carried out by people with the appropriate skills and capacity;
- make property developers accountable for decisions and actions over which they have control;

- ensure that property developers that lack the capacity to capably undertake development work, including those with close associates or key persons that are unsuitable, are not able to carry on a business as a property developer in the ACT;
- improve outcomes for building owners and occupants through a transparent and accountable property development industry; and
- positively impact on the economic sustainability of the property development sector in the ACT.

***Rational connection between the limitation and the purpose (s28 (d))***

There is a clear connection between the limitation and the legitimate purpose. The knowledge and the evidence of the matters that the defendant is required to prove are matters that are uniquely within the knowledge of the defendant and it would be unreasonable for the prosecution to establish those matters.

***Proportionality (s28 (e))***

Under the HRA, the presumption of innocence may be subject to reasonable and justifiable limitations in accordance with section 28 of the HRA. This means that limitations imposed by reverse burdens can be justified under the HRA where they are reasonable, necessary and proportionate in pursuit of a legitimate objective.

It is not considered that there are any less restrictive means reasonably available to achieve the purpose of the Bill. The burden of proof remains on the prosecution to prove the other elements of the offence. The reverse onus is limited to evidentiary matters that are specifically within the knowledge of the defendant and for which it would be unreasonable for the prosecution to establish.

## REGULATION – STATUTORY CHAIN OF ACCOUNTABILITY

This section of the human rights assessment relates to the reforms contained in the Bill that support the broader ACT Government building reform agenda. This includes reforms to:

- support accountability of all property developers whether or not they are required to be licensed
- support a building regulatory system that can be effectively regulated
- support, drive and deliver high quality design and building, compliance with building standards and integrity and accountability in the ACT building and construction industry.

The Bill:

- introduces:
  - Accountability for property developers for work undertaken as part of development activity, whether required to be licensed or not by bringing them into the statutory chain of accountability for building work.
  - A statutory presumption on builders and property developers that defects claimed by owners are defects for which the builder and/or property developer are liable unless the builder and/or property developer proves the contrary. This statutory presumption will operate for the first two years following the issuance of a certificate of occupancy.
  - Powers to issue rectification orders, stop work orders, and undertakings to any entity undertaking residential development activity, whether required to be licensed or not. These powers will be exercised by the Registrar established by the Property Developer Licensing Scheme.
  - A requirement for a digital building manual to be prepared and approved before a certificate of occupancy can be issued. This will assist the new owners of the building to plan for maintaining their building. It will also assist in responding to unforeseen events, such as responding to equipment failure.
- Extends the application of statutory warranties to property developers (whether required to be licensed or not) to provide consumers with legal recourse directly to both the property developer and the builder in the event that there are defects in the building work that amount to a breach of statutory warranties.
- Increases transparency for purchases of off-the-plan units by requiring additional information in contracts for sale to enable consumers to have greater transparency about the development they are considering buying into so that they can make a more informed choice when deciding between apartments in different developments.
- Establishes the framework for requiring certain persons within the statutory chain of accountability to have latent defect insurance.

## **Rights engaged**

The Bill engages and limits rights in the following sections of the HRA:

- Section 12 – Privacy and Reputation
- Section 21 – Right to fair trial
- Section 22 – Rights in criminal proceedings

### Right to Privacy and Reputation

The right to privacy under section 12 of the HRA protects people in the ACT from ‘unlawful’ interference with their privacy. This means that no interference can take place except in cases authorised by law.

The right to privacy also protects against arbitrary interference relating to an individual, an individual’s family, home or correspondence, even when authorised by law. Such interference should be in accordance with the provisions, aims and objectives of the HRA and be reasonable in the particular circumstances. Arbitrary interference in someone’s private or family life is interference that may be lawful, but is unreasonable, unnecessary and the degree of interference is not proportionate to the need.

### ***Nature of the right and the limitation (s28(a) and (c))***

The Bill limits the right to privacy by the provision of powers to access an individual’s home. In the event that the property developer fails to or is unable to comply with the rectification order, the Bill provides that the Territory may arrange rectification orders (clause 58). The Bill requires an authorised persons to be provided with access to premises for the purposes undertaking rectification work consistent with a rectification order (Part 6) and thus access to the individual’s home and limiting their right to privacy. Access will be required to undertake the rectification of a defect consistent with a rectification order.

The Bill also provides the registrar with the power to issue an access order to the occupier of land to which a rectification order has been made. The access order will require the occupier of the land to permit reasonable access to the land within a stated period to allow the rectification order to be complied. It is an offence to not comply with an access order.

The Construction Occupations Registrar and building inspectors will also have a role in regulating and enforcing the scheme as part of their existing role in regulating buildings and building work. This may include the need to access an individual’s home.

### ***Legitimate purpose (s28 (b))***

The legitimate objective of the Bill is to:

- support accountability of all property developers whether or not they are required to be licensed;

- support a building regulatory system that can be effectively regulated;
- support, drive and deliver high quality design and building, compliance with building standards and integrity and accountability in the ACT building and construction industry.

The Bill will promote good property development outcomes, increase community confidence in the building and construction sector, and protect consumers from poor building quality and unsafe buildings.

The Bill will:

- promote best practice across the property development sector in the ACT by bringing property developers into the statutory chain of accountability;
- make property developers accountable for decisions and actions over which they have control;
- improve outcomes for building owners and occupants through a transparent and accountable building and construction industry; and
- positively impact on the economic sustainability of the property development sector in the ACT.

### ***Rational connection between the limitation and the purpose (s28 (d))***

Residential property development is a significant economic driver in the ACT, and many types of individuals and businesses enter into arrangements with property developers and builders. The purchase of a home is also one of, if not the, biggest financial investment that an individual will make.

The purpose of requiring authorised persons to access an individual's home is to enable rectification work not undertaken by a property developer issued with a rectification order to be conducted in a timely and safe fashion, and to protect the rights and safety of all owners and occupants of the building.

The purpose of providing the registrar the power to issue an access order and the associated offence of failing to comply with an access order achieves the purpose of the Bill of protecting consumers and the community from poor building quality and unsafe buildings. Rectification orders can only be issued where work could result in a serious defect in the building or the building has a serious defect.

The purpose of providing the Construction Occupations Registrar and building inspectors access to an individual's home is to ensure compliance with the framework through education and appropriate regulatory action.

The Construction Occupations Registrar and building inspectors will only access an individual's home when required for regulatory action. The Bill relies on existing inspection and audit powers under the *Building Act 2004* which contains existing safeguards to ensure that an individual's home is not interfered with unlawfully or arbitrarily.

### ***Proportionality (s28 (e))***

Authorised contractors may have reasonable access to a person's home but only for the purposes of work required to comply with a rectification order to fix or make safe a serious building defect. Failure to fix the serious building defect means that the building or part of the building would be unsafe to inhabit or to use for its intended purpose, thus potentially impinging on the rights of other building inhabitants or owners. This promotes the safety and long-term peace and enjoyment of all occupants of a building.

Safeguards include:

- Clause 61 allows for a person to claim reasonable compensation from the Territory if the person suffers loss or expense if the rectification work is arranged by Territory.
- The authorised contractor must give the occupier of the land written notice that they intend to enter the land at least 24 hours before entering the land
- The authorised contractor must give a copy of the notice to the ordered party before entering the land.
- The costs associated with such rectification order are born by the ordered party not the occupier of the land (unless they are the same person)

The powers included in the Bill in relation to rectification orders align with existing provisions in the ACT's building regulatory system in respect to builders. These new powers on property developers seek to enable both key parties to property development activities to be held equally accountable for defects.

Access orders are necessary to protect the protect the rights and safety of all owners and occupants of buildings where serious defects have been identified as existing or likely to exist.

Authorised persons will provide an essential function to support the regulatory framework and support the community to have buildings that are safe and compliant.

The Bill also utilises existing powers that the Construction Occupations Registrar and building inspectors have in the *Building Act 2004* in relation to building work to support enforcement of the framework. The existing powers include safeguards around building inspectors providing evidence of authorisation to remain on premises when asked by the occupier of the premises.

Building inspectors are appointed by the Construction Occupations Registrar and perform statutory functions. Building inspectors apply the Access Canberra Accountability Commitment Framework which establishes a risk-based approach to taking regulatory action. The Access Canberra Accountability Commitment Framework includes the [Building and construction services compliance framework](#) which is publicly available.

Right to Fair Trial – Emergency rectification orders and rectification orders where property developer wound up etc

The right to a fair trial is protected by section 21 of the HRA. Section 21 protects the right to procedural fairness, and can also extend to protect third parties whose substantive legal rights may be affected by a rectification order.

### ***Nature of the right and the limitation (s28(a) and (c))***

The Bill limits the right to a fair trial through powers to issue emergency rectification orders.

It may also engage the right to fair trial through the inclusion of power to give rectification order to directors if the property developer is the subject of a winding up order; or placed into administration, receivership or liquidation; or the developer is deregistered. .

The Bill provides that in issuing an emergency rectification order, the registrar does not need to give the property developer a proposed rectification order. This limits their right to a fair trial as they have not been provided with an opportunity to give a written submission about the rectification order and have that considered in the decision by the registrar to issue a rectification order.

### ***Legitimate purpose (s28 (b))***

The legitimate objective of this component of the Bill is to:

- support accountability of all property developers whether or not they are required to be licensed;
- support a building regulatory system that can be effectively regulated;
- support, drive and deliver high quality design and building, compliance with building standards and integrity and accountability in the ACT building and construction industry.

The Bill will promote good property development outcomes, increase community confidence in the building and construction sector, and protect consumers from poor building quality and unsafe buildings.

The Bill will:

- promote best practice across the property development sector in the ACT by bringing property developers into the statutory chain of accountability;
- make property developers accountable for decisions and actions over which they have control;
- improve outcomes for building owners and occupants through a transparent and accountable building and construction industry; and
- positively impact on the economic sustainability of the property development sector in the ACT.

### ***Rational connection between the limitation and the purpose (s28 (d))***

Residential property development is a significant economic driver in the ACT, and many types of individuals and businesses enter into business arrangements with

property developers. The purchase of a home is also one of, if not the, biggest financial investment that an individual will make.

Emergency rectification orders may only be issued where the registrar is satisfied that a serious defect, or possible serious defect, in a residential building needs to be rectified urgently to protect the health and safety of people, property, or the environment. Emergency rectification orders enable rectification work to be conducted in a timely and safe fashion, and to protect the rights and safety of all owners and occupants of the building. A failure to fix a serious or potentially serious building defect means that the building or part of the building would be unsafe to inhabit or to use for its intended purpose, thus potentially impinging on the rights of other building inhabitants or owners. This promotes the safety and long-term peace and enjoyment of all occupants of a building.

### ***Proportionality (s28 (e))***

It is important that the regulatory framework supports the community to have buildings that are safe and compliant with building standards. Rectification of serious defects needs to be undertaken in a timely manner in order to protect the safety and promote long-term peace and enjoyment of all occupants of a building.

Given the economic and safety risks and need for rectification work in the context of a corporation being unable to undertake rectification works due to being wound up etc, and the connection of the directors to the activity of the property developer, it is appropriate for the rectification order to be able to be issued to the directors individually in that situation. This mirrors how other laws apply liability to directors individually.

Safeguards include:

- that the liability of a director is limited where the company remains open and there is a Latent Defect Insurance product in place.
- emergency rectification orders may only be issued where the registrar is satisfied that a serious defect, or possible serious defect, in a residential building needs to be rectified urgently to protect the health or safety of people, property, or the environment.

This element is intended to reduce the risk, delay, and expense for consumers. Bringing residential property developers and their directors into the chain of accountability will focus residential property developers on making sure that their developments are delivered to an appropriate standard.

## Right to Fair Trial - Reverse burden – legal

Placing the onus of proof upon a defendant is known as a reverse onus of proof and this engages the right to fair trial which protects rights to procedural fairness.

### ***Nature of the right and the limitation (s28(a) and (c))***

The Bill limits the right to a fair trial through introducing a new provision regarding defective building work, which is detailed in Schedule 2 of the Bill. This provision amends the *Building Act 2004* by providing that an affected party may require a builder or property developer to rectify a defect after completion. Under this provision, following the completion of a residential development, an affected party such as an owners corporation may give a builder or property developer notice requiring a defect to be rectified. Where this notice is given in the first two years following completion, new proposed section 89F(3) provides that it is presumed that the notice is true unless the contrary is proven. Thus introducing a reverse legal burden on the builder or property developer to prove that a defect exists. The provision creates the presumption that an alleged defect is the responsibility of the builder and the property developer and that they must present, or point to, evidence that suggests a reasonable possibility that there is not a defect or that the defect is as a result of poor maintenance or misuse.

### ***Legitimate purpose (s28 (b))***

The legitimate objective of this component of the Bill is to:

- support accountability of all property developers whether or not they are required to be licensed;
- support a building regulatory system that can be effectively regulated;
- support, drive and deliver high quality design and building, compliance with building standards and integrity and accountability in the ACT building and construction industry.

The Bill will promote good property development outcomes, increase community confidence in the building and construction sector, and protect consumers from poor building quality and unsafe buildings.

The Bill will:

- promote best practice across the property development sector in the ACT by bringing property developers into the statutory chain of accountability;
- make property developers accountable for decisions and actions over which they have control;
- improve outcomes for building owners and occupants through a transparent and accountable building and construction industry; and
- positively impact on the economic sustainability of the property development sector in the ACT.

### ***Rational connection between the limitation and the purpose (s28 (d))***

The reverse evidentiary requirements for defects for the first two years following the completion of a building will help protect owners and occupants of residential dwellings by making it easier for them to progress rectification of any defects and is directly connected to the purpose of the Bill.

### ***Proportionality (s28 (e))***

Providing for a statutory presumption in favour of consumers will assist consumers, in that it will establish a clear obligation on the builder and the property developer to remedy the defect or compensate the owners. This element aligns with the other measures included in the scheme to strengthen the position of owners to have defects resolved promptly for the period over which it applies.

In administering and regulating the building and construction industry in the ACT, the government works from the notional position that a defect identified in the design phase of a building costs \$1 to rectify, it costs \$10 if identified during construction and costs \$100 to rectify if identified post-construction once the building is occupied. Therefore, regulatory efforts are best targeted to the identification and rectification at the earliest possible time.

The reverse evidentiary provisions go some way to addressing the imbalance of power between the developer and their builder, and the owner in relation to technical knowledge. The developer and their principal builder have technical knowledge and expertise that the owner does not have. They also have intimate knowledge of how the owner's building has been built and will usually be in the best position to know promptly whether issues raised by an owner or body corporate are defects or not. This is particularly so for complex multi storey buildings. The developer and their principal builder could also be incentivised to reject defect claims, leaving the owner to incur significant cost for consultants to inspect the building and confirm that defects exist in order for a developer and their builder to respond. By imposing a reverse evidentiary burden on the builder and developer it is intended that defects raised by an owner should be more readily and promptly acted on with the obligation on the developer and their builder to prove there is no defect.

After the first 2 years, owners may continue to bring claims for defects against the builder or developer for the statutory warranty period but at that point they bear the onus of proof.

Safeguards include a defect will not be attributed to the builder or property developer, where the defect is caused by lack of maintenance or was caused by a person other than the builder or property developer or where the defect is not repaired promptly.

The two-year reverse evidentiary burden requirement does not impact existing statutory warranty provisions for building work, as detailed in s 88 of the *Building Act 2004*.

### **Rights in Criminal Proceedings – strict liability offences**

Section 22 (1) of the HRA provides that everyone charged with a criminal offence has the right to be presumed innocent until proven guilty according to law. The assessment below relates only to those strict liability offences related to the statutory chain of accountability reforms in the Bill.

### ***Nature of the right and the limitation (s28(a) and (c))***

The Bill introduces several strict liability offences including:

- An entity provides false or misleading information in a building manual (Schedule 2, Part 2.1 *Building Act 2004*, clause 48B) (maximum penalty: 50 penalty units)
- A seller enters into an off-the-plan contract and does not hold a property developer licence or has a condition on their licence which restricts the seller from entering into the off-the-plan contract (Schedule 2, Part 2.4 *Civil Law (Sale of Residential Property) Act 2003*, clause 19AB (1)) (maximum penalty: 100 penalty units).
- A person advertises for the sale of premises under an off-the-plan contract without the inclusion of the property developer licence number (Schedule 2, Part 2.4 *Civil Law (Sale of Residential Property) Act 2003*, clause 19AC (1)) (maximum penalty: 5 penalty units).
- A person advertises for the sale of premises under an off-the-plan contract and includes false or misleading information about the property developer's licence number (Schedule 2, Part 2.4 *Civil Law (Sale of Residential Property) Act 2003*, clause 19AC (4)) (maximum penalty: 5 penalty units).
- 

Strict liability offences typically arise in a regulatory context where, for reasons such as public safety and ensuring that regulatory schemes are complied with, criminal penalties are required. A defendant can reasonably be expected, because of their involvement with the regulated activity, to know what the requirements of the law are, and as such the mental, or fault, element can justifiably be excluded.

### ***Legitimate purpose (s28 (b))***

The legitimate objective of this component of the Bill is to:

- support accountability of all property developers whether or not they are required to be licensed;
- support a building regulatory system that can be effectively regulated;
- support, drive and deliver high quality design and building, compliance with building standards and integrity and accountability in the ACT building and construction industry.

The Bill will promote good property development outcomes, increase community confidence in the building and construction sector, and protect consumers from poor building quality and unsafe buildings.

The Bill will:

- promote best practice across the property development sector in the ACT by bringing property developers into the statutory chain of accountability;
- make property developers accountable for decisions and actions over which they have control;
- improve outcomes for building owners and occupants through a transparent and accountable building and construction industry; and
- positively impact on the economic sustainability of the property development sector in the ACT.

***Rational connection between the limitation and the purpose (s28 (d))***

The intention of the strict liability offences introduced by this Bill is to support an effective regulatory scheme. The purpose of the specific penalties attributable to these offences is to provide an appropriate disincentive from undertaking the actions subject to the offence provisions. These strict liability offences are also part of a scalable offence structure which includes offences that include the fault elements of recklessness and intent.

As with many regulatory frameworks, the inclusion of a suite of strict liability offences is considered important in deterring non-compliance. This range of strict liability offences supports a regulatory framework that is intended to provide improved outcomes for people and businesses that engage with property developers.

These strict liability offences are designed to support the effective operation of the regulatory scheme as they target individuals engaging in behaviour that is not permitted. For a person to commit an offence under the Bill they would be required to be actively involved in the behaviour resulting in the offence and are on notice that the conduct they are engaging in is prohibited.

***Proportionality (s28 (e))***

The inclusion of strict liability offences in the Bill is necessary to deter individuals from engaging in activities that are inconsistent with the objects of the Bill and the obligations placed on property developers. There are no less restrictive means available to effectively achieve this purpose.

The risk of inadvertent breach of these provisions is low. Persons covered by regulatory frameworks are provided with adequate information about their obligations under those frameworks and the provisions explicitly state the conduct that is required to commit the offence. Appropriate regulatory actions are essential to building community confidence in the building and construction industry in the ACT and the regulatory oversight of the industry.

There is a high expectation that professionals and other people involved in the development and building of buildings that include a residential component will exercise appropriate skill and care and it is important that this standard is enforced through appropriate penalties to protect the community and deter unsafe behaviours.

The offences and penalties are consistent with the *ACT Guide for Framing Offences* and are considered proportionate to the purpose of the Bill. The maximum penalties attached to the offences reflect the seriousness of the offence relative to other offences in the Bill and other offences of a similar nature. They also reflect the level of responsibility the person committing the offence has for the conduct that will result in the offence being committed and the potential serious consequences that can arise for the community and consumers where there is non-compliance with the provisions.

Penalties created for the strict liability offence may include infringement notice penalties. Any infringement notice penalties will be established in a regulation under the *Magistrates Court Act 1930* (ACT). Infringement notices play an important role in effective regulatory frameworks by providing a deterrent to non-compliance and an alternative prosecution. Effective infringement notice schemes minimise the cost of litigation for the Territory while offering people a choice whether to accept a lesser penalty without admitting the offence or remaining liable to prosecution.

Any breaches of the offence framework will be managed through an ‘engage, educate and enforce’ compliance process. This provides a safeguard to ensure the limitation on rights is reasonable and proportionate. Should a breach occur, conduct that contravenes the legislative framework will be considered on a case-by-case basis and within its own context.

The strict liability offences introduced by this Bill are framed with clear criteria as to whether the offence has occurred. This means individuals can reasonably be aware they have an obligation under law.

An extensive communication and awareness campaign will be undertaken with the community and industry as part of implementation and commencement of the Bill.

The clear framing of offences, as well as strong communication around the obligations of individuals operating in the industry are important safeguards on individual rights and ensure the proportionality of introducing strict liability offences.

Chapter 2 of the Criminal Code applies to all offences under this Act. There is a specific defence of mistake of fact for strict liability offences (section 23 *Criminal Code 2002*), which preserves the principle that a person is innocent until proven guilty, is available in response to the strict liability offences. Section 23 (3) of the Code makes it clear that other defences may also be available for strict liability offences, including the defence of intervening conduct or event (section 39), duress (section 40), sudden or extraordinary emergency (section 41), self-defence (section 42) or lawful authority (section 43).

### **Climate Change Implications**

There are no climate change implications from the Bill.

## APPENDIX A

### Property Developers Bill 2023 *Human Rights Act 2004 - Compatibility Statement*

In accordance with section 37 of the *Human Rights Act 2004* I have examined the **Property Developers Bill 2023**. In my opinion, having regard to the outline of the policy considerations and justification of any limitations on rights outlined in this explanatory statement, the Bill as presented to the Legislative Assembly **is** consistent with the *Human Rights Act 2004*.

.....

Shane Rattenbury MLA  
Attorney-General

## **CLAUSE NOTES**

### **PART 1      PRELIMINARY**

Part 1 deals with formal matters including commencement and objects of the Act.

#### **Clause 1      Name of Act**

This clause provides that the name of the Act is the *Property Developers Act 2023*.

#### **Clause 2      Commencement**

This clause provides for the commencement of the Act. The Act, other than the licence requirement provisions, commences on a day fixed by the Minister by written notice. A separate provision exists to allow for the licence requirements to commence on a day fixed by the Minister. This will allow the licensing and regulatory regimes that the Bill provides the framework for to be established in advance of applications for licenses being accepted, and the granting of licenses.

If the Act (other than the licensing requirement provisions) has not commenced within 2 years following its notification day, it automatically commences. The licence requirement provisions automatically commence after 3 years following the Act's notification day.

Section 81 of the *Legislation Act 2001* (the Legislation Act) allows for appointments and statutory instruments to be made in the period between notification and commencement. Statutory instruments and appointments relating to key elements of the scheme (for example: code of practice; appointment of the registrar and approval of rating entities); need to be in place before the scheme can formally commence.

#### **Clause 3      Dictionary**

This clause states that the dictionary at the end of the Bill is, once enacted, part of the Act.

#### **Clause 4      Notes**

This clause states that a note included in this Act is explanatory and does not form part of the Act.

#### **Clause 5      Offences against Act-application of Criminal Code etc**

This clause provides that the Criminal Code, chapter 2 applies in relation to all offences against the Act. The Legislation Act, section 133 applies in relation to the meaning of penalty units expressed in the Act.

#### **Clause 6      Objects of Act**

This clause sets out the objects of the Act.

The objects reflect the important role property developers have in the community and seek to provide the public with confidence that the buildings they purchase are carried out by suitable people that are accountable for the development activities they carry out.

The objects will be achieved through:

- a. imposing standards of practice and competency for the residential development activities undertaken by property developers;
- b. establishing a licensing scheme for property developers;
- c. requiring property developers to rectify serious defects, or possible serious defects, in residential buildings they construct or arrange to be constructed;
- d. providing for the monitoring and enforcement of compliance with this Act.

## **PART 2      REGISTRAR AND DEPUTY REGISTRARS**

Part 2 establishes the administration arrangements for the operation of the scheme.

### **Clause 7      Appointment of Property Developer Registrar**

This clause provides for the appointment of an Australian Capital Territory Property Developer Registrar (the registrar) by the director-general. The appointee will be a public servant and will be appointed for a term not longer than five years. Appointment will be in the form of a notifiable instrument.

### **Clause 8      Delegation by registrar**

This clause provides for the delegation of the functions of the registrar under this Act or another territory law to a public servant.

### **Clause 9      Appointment of deputy registrars**

This clause provides that the registrar may appoint a public servant as a deputy registrar. The appointment will be for a term not longer than five years and will be in the form of a notifiable instrument.

### **Clause 10     Functions of deputy registrars**

This clause provides the functions that can be exercised by a deputy registrar (excluding the power to delegate a function), and the process by which the registrar may limit the functions a deputy registrar may exercise, or direct a deputy registrar as to how a function is to be exercised.

If the registrar directs a deputy registrar as to how a function is to be exercised, the deputy registrar must only exercise the function in accordance with that direction.

## **PART 3      LICENSING OF PROPERTY DEVELOPERS**

Part 3 establishes the licensing requirements and process for property developers.

## **Division 3.1 Property developer licences**

### **Clause 11 Purpose—pt 3**

The purpose of this part is to allow a person to apply for and to obtain a licence to: apply for development approval; apply for a building approval, building commencement notice, or certificate of occupancy; or to sell or advertise the sale of residential property off-the-plan.

### **Clause 12 Meaning of *associated entity* and *key person***

This clause defines ***associated entity*** and ***key person*** for the Act.

Associated entities and key persons are important concepts to achieving accountability and transparency in the scheme.

An associated entity is a related corporation of a property developer, or an entity prescribed by regulation.

A key person is an individual involved with the property developer who is in a position to control or has significant influence over the conduct of a property developer. A key person can be related to the property developer or an associated entity of the property developer. A key person does not include a person giving professional advice, the regulator, or an administrator.

This clause provides for other entities to be prescribed by regulation. This provides flexibility allowing for the clarification of associated entities or key people based on experience of the operation of the legislation.

### **Clause 13 Meaning of *suitable person***

This clause defines ***suitable person*** for the purposes of the Act. It sets out that in determining a person's eligibility the registrar must consider their character, history of compliance or ability to comply with the Act and relevant laws, their operational and financial capacity, their competency and if they have previously been licensed.

It identifies that if the applicant is an individual the registrar must also consider if the applicant has been an insolvent, has been a key person in a corporation that has been placed into administration, and if the applicant has been disqualified from managing a corporation under the *Corporations Act 2001*. It also provides that the registrar may consider any other matter the registrar considers relevant.

### **Clause 14 Meaning of *rating report* – pt3**

This clause defines what a ***rating report*** is for the purposes of applying for a property developer licence. It identifies that the report must be prepared by a rating entity and must include an assessment of the operational and financial capacity of the applicant to carry on a business as a property developer.

This clause also provides that a rating report must satisfy other requirements as prescribed by regulation. This allows for future updates to ratings reports requirements based on experience of the operation of the legislation.

## **Division 3.2 Property developer licences**

### **Clause 15 Applications for licence**

This clause provides that a person may apply to the registrar to be licensed as a property developer and sets out what must be included in an application. The registrar may refuse to consider an application that does not comply with the requirements.

### **Clause 16 Eligibility for licence**

This clause contains the eligibility criteria for obtaining a licence to be a property developer. To be eligible for a licence the applicant must:

- (a) satisfy the registrar that the applicant is a suitable person who has the operational and financial capacity to carry on a business as a property developer; and
- (b) not be disqualified from applying for a licence; and
- (c) meet any other eligibility requirements prescribed by regulation.

### **Clause 17 Applications for licence renewal**

This clause provides that a person may apply for renewal of their licence as a property developer and sets out what must be included in an application for renewal.

An application for renewal must be made no earlier than three months before the current licence expires, and no later than six months after the current licence ends. An application for renewal made six months after the current licence expired will need to be re-made as a new application for a licence.

The registrar has the power to refuse to consider an application for a licence renewal that does not comply with this clause.

### **Clause 18 Eligibility for licence renewal**

This clause provides the eligibility criteria for a licence renewal. An applicant is eligible to have their licence renewed if:

- a. the registrar is satisfied that the applicant is a suitable person and continues to have the operational, financial capacity to carry on a business as a property developer; and
- b. the applicant has undertaken relevant competency requirements; and
- c. meets any other eligibility requirements prescribed by regulation.

### **Clause 19 Registrar may request more information**

This clause provides the registrar with the power to require an applicant for a licence or renewal, to give the registrar information that the registrar reasonably needs to decide the application. For example, the registrar could use this power to request a new ratings report regarding the applicant's operational and financial capacity.

A request must be in writing and if an applicant refuses to comply with a request, the registrar may refuse to consider the application further.

## **Clause 20 Change of information must be provided**

This clause provides that if information provided in an application for a licence or renewal changes before the application is decided, the applicant must give the registrar written notice of the changes.

## **Clause 21 Deciding applications**

This clause provides that if a person makes an application for a licence or renewal, and they are eligible for a licence, the registrar must register the entity or renew their licence. The registrar must refuse to licence a person or renew their licence if they are not eligible.

In addition, this clause provides that:

- the renewed licence begins on the day after the licence being renewed ends
- a licence that has been suspended may be renewed but the renewed licence is suspended until the suspension ends.

## **Clause 22 Licence valid until application for renewal decided**

This clause provides that once an application for renewal is made, the property developer's existing licence continues in force until the application is decided, even if this means the term of licensing will be more than the maximum licence term.

## **Clause 23 Licence conditions**

This clause provides the conditions that a property developer's licence is subject to, including complying with the Act and other relevant laws, demonstrating a level of competence, and ongoing operational and financial capacity.

The registrar may impose a condition on the licence, such as limiting the number of concurrent developments, limiting the size of projects or requiring inspection of design documentation.

To ensure procedural fairness, a property developer must be given written notice by the registrar of the condition proposed to be imposed, the reasons why the condition is proposed, and provide 28 days to respond to the notice. The registrar must then consider any response to the notice.

## **Clause 24 Licence term**

This clause provides that the term of a licence begins on the day stated in the licence, and ends either in three years, or when the licence is cancelled or suspended.

## **Clause 25 Content of licence**

This clause provides the information that must be included in a licence, including the name of the licensee, identifying number, term and conditions of the licence. The registrar has the power to include any other information in a licence that they consider relevant.

## **Division 3.3 Licence variations and change of circumstances**

## **Clause 26 Variation of licence**

This clause provides for the variation of a licence either at the request of the licensee, or on the registrar's own initiative.

To ensure procedural fairness, a property developer must be given written notice by the registrar of the proposal to vary the registration, and provide them 28 days to respond to the notice. The registrar must consider any response to the notice in making their decision to vary the licence. Written notice is to be provided if a decision is made to vary a licence.

## **Clause 27 Notifying registrar about change of circumstances**

This clause provides that a licenced property developer must notify the registrar about a range of events, including a change of name or contact details, change of associated entity or key person, or change of information in a licence application or renewal.

Notification must be given to the registrar in writing, within 14 days of the licensed property developer becoming aware of the event.

Failure to notify of a change to the licensed property developer's licence application or renewal application information or other event or circumstances prescribed by regulation will be a strict liability offence with a maximum penalty of 20 penalty units.

## **Division 3.4 Register of licensed property developers**

### **Clause 28 Registrar must keep register**

This clause provides that the registrar must keep a register of licensed property developers (the register) and prescribes the details that must be kept on the register, such as the a licensee's business name, licence number and any conditions that have been placed on their licence.

The register may also contain any other details the registrar considers appropriate. Information about former licensees must be kept on the register for ten years after the day their registration ended. The registrar may correct any mistake, error or omission in the register.

### **Clause 29 Publication of information in register**

This clause provides that the registrar must make the information held in the register available to the public. Information about a former licensee must be made available to the public.

The registrar must not make information about a licensee or former licensee available to the public if requested by the licensee or former licensee, and the registrar is satisfied that the publication of the information would, or could reasonably be expected to endanger the life or physical safety of any person; or jeopardise national security.

## **PART 4 RATING ENTITIES**

Part 4 establishes rating entities. Rating entities are an integral part of the licensing scheme.

### **Clause 30 Approval of rating entities**

This clause provides for approval of an entity to prepare rating reports (rating entity). Rating entities will be approved by the director-general, with approval in the form of a notifiable instrument. Conditions of approval can be made through regulation.

To be eligible for approval as rating entity, the entity must hold an Australian financial services licence. This clause also sets out the eligibility criteria for being a rating entity, and that additional criteria can be prescribed by regulation.

### **Clause 31 Approval valid until new application decided**

This clause provides for that once an application for a new rating entity approval is made, the rating entity's approval continues in force until the application is decided, even if this means the existing approval will be more than the maximum term.

### **Clause 32 Variation of approval**

This clause provides for the variation of an approval either at the written request of the rating entity or on the director-general's own initiative.

To ensure procedural fairness, a rating entity must be given written notice by the director-general of any proposal to vary the approval, and provide 28 days to respond to the notice.

The director-general must consider any response to the notice in making their decision to vary the approval or not. A variation to an approval must be in the form of a notifiable instrument.

### **Clause 33 Revocation of approval**

This clause provides for the revocation of approval of rating entity either at the written request of the rating entity or on the director-general's own initiative. Revocation is in the form of a notifiable instrument.

If the revocation is at the request of the rating entity, revocation will not come into effect until at least 90 days after the day the revocation is notified or if a later date is stated in the revocation, that date. This ensures that there is no negative impact to the licensing scheme and individuals seeking a licence as a result of a rating entity no longer being approved.

If the revocation is at the director-general's own initiative, the director-general must be satisfied that a specified ground applies, give the entity written notice, which includes 28 days for a response, and consider any response. Revocation through this process will take effect on the day stated in the revocation.

## **PART 5 LICENSED PROPERTY DEVELOPERS – REGULATORY ACTION**

Part 5 provides for when and how regulatory action can be taken in relation a property developer.

## **Division 5.1 Automatic licence suspension**

### **Clause 34 Automatic suspension of licence**

This Clause provides for a licensee's licence to be automatically suspended if the annual fee is not paid, if an individual licensee becomes bankrupt or personally insolvent, or if a licensee that is a corporation becomes the subject of a winding-up order or had a controller or administrator appointed.

## **Division 5.2 Regulatory action**

### **Clause 35 Definitions—div 5.2**

This clause defines *ground for regulatory action*, *licensee*, *proposed regulatory action* and *show cause notice* for this Division.

Regulatory action is an important element of the Act and includes reprimands, a direction to undertake training, imposing a condition on the licence, and suspending or cancelling a licence.

### **Clause 36 Grounds for regulatory action**

This clause sets out what constitutes a *ground for regulatory action* against a licensed property developer. The grounds include using false or misleading information to become a licensee, failing to comply with a condition on a licence, and being found guilty of an offence.

### **Clause 37 Notice of proposed regulatory action**

This clause provides that where the registrar is satisfied that a ground for regulatory action exists in relation to a licensee, and the registrar proposes to take regulatory action, the registrar must give the licensee a written show cause notice. The clause sets out the requirements for the information that must be included in the show cause notice.

In accordance with administrative law principles, the registrar must be satisfied on reasonable grounds that a ground for regulatory action exists before taking any action.

### **Clause 38 Taking regulatory action**

This clause provides that the registrar may only take the proposed regulatory action against a licensee if a show cause notice has been issued, the registrar has considered any submissions in response to the show cause notice, and is satisfied that it is appropriate to take the proposed regulatory action against the property developer.

Where the registrar decides to take the proposed regulatory action, the registrar must give the property developer written notice of the regulatory action, with the action taking effect 14 days after the notice is given, or the date stated in the notice.

### **Clause 39 Not taking regulatory action**

This clause sets out the obligations on the registrar following the issuing of a show cause notice and receipt of a submission in response, should the registrar decide not to take regulatory action.

#### **Clause 40 Effect of suspension**

This clause provides that if the licence is suspended, the person is taken not to be a licensed property developer during the period of suspension.

### **Division 5.3 Immediate suspension or cancellation of licence**

#### **Clause 41 Immediate suspension or cancellation**

This clause provides the registrar with the power to immediately suspend or cancel a property developer's licence, where a ground for regulatory action exists and it is in the public interest to immediately suspend or cancel the licence.

This clause sets out the contents of the immediate action notice, the registrar must give to a property developer, in writing, if the registrar immediately suspends or cancels a registration. This notice may be given orally if the registrar believes there is an immediate risk to the safety of any person.

This clause sets out when suspension or cancellation takes effect and when a suspension ends.

#### **Clause 42 Effect of immediate suspension**

This clause provides that if the property developer's licence is immediately suspended, the person is taken not to be a licensed property developer during the period of suspension.

#### **Clause 43 Revoking immediate suspension or cancellation**

This clause allows for revocation of an immediate suspension or cancellation by the registrar on written application by the person whose registration is suspended or cancelled or on their own initiative.

An application must be made no later than 14 days after the day the person is given the immediate action notice. Written notice must be provided if the registrar decides to revoke an immediate suspension or cancellation.

### **Division 5.4 Other regulatory action**

#### **Clause 44 Voluntary cancellation of licence**

This clause provides that the registrar must cancel the licence of a property developer at the request of the licensee if satisfied it is appropriate to cancel the registration. Circumstances where cancelling the registration may not be appropriate include if a complaint has been received about the licensee or where disciplinary action is being considered.

#### **Clause 45 Application to disqualify person from applying for licence**

This clause applies where the registrar has suspended or cancelled the licence of a property developer. The registrar may apply to ACAT for an order such as cancelling a suspending licence as part of an application for an order disqualifying the person,

disqualifying the person from applying for a property developer licence, or requiring the person to pay the Territory a stated amount of not more than \$200,000.

ACAT may make any other order it considers appropriate, and in making an order, consider any matter prescribed by regulation.

## **Division 5.5 Miscellaneous**

### **Clause 46 Registrar may consult people before exercising functions**

This clause provides the registrar with the power to consult any person the registrar considers appropriate in exercising functions under this Part. To support this consultation the registrar is authorised to disclose information that relates to the exercise of the function.

## **PART 6 RECTIFICATION ORDERS, STOP WORK ORDERS AND UNDERTAKINGS**

Part 6 establishes the process for issuing rectification orders, stop work orders and undertakings against a property developer.

### **Division 6.1 Preliminary**

#### **Clause 47 Application—pt 6**

This clause provides that this Part applies to residential building work up to ten years old, and includes work that started or was completed before this Part commenced.

#### **Clause 48 Definitions—pt 6**

This clause defines a range of key terms for this Part, including ***authorised contractor, compliance cost action, compliance undertaking, director, proposed rectification order notice, rectification order, rectify, required rectification order*** and ***stop work order***.

#### **Clause 49 Meaning of property developer—Part 6**

This clause defines the concept of a property developer. This includes a person who contracts or arranges for, or facilitates or otherwise causes the building work to be done; the owner of the land on which the building work is carried out at the time the work is done; the principal builder of the building work; the developer as defined by the *Unit Titles Act 2001* for a units plan; and any other person prescribed by regulation. A regulation may also exclude a person from the definition of a property developer.

#### **Clause 50 Meaning of serious defect**

This clause defines ***serious defect*** as a defect relating to a failure to comply with the building code or defective design, that causes or is likely to cause an inability to use the building or the destruction or collapse of any part of the building.

### **Division 6.2 Rectification orders**

#### **Clause 51 Notice of proposed rectification order**

This clause provides that the registrar may give the property developer a ***proposed rectification order notice*** if the registrar believes on reasonable grounds that residential building work could result in a serious defect.

The notice will give details of the proposed rectification order, explains the reasons behind the order, and requests a written submission on the order within 28 days.

#### **Clause 52 Making a rectification order**

This clause provides that, following consideration of any submissions on the notice of proposed rectification order, the registrar may make a rectification order against a property developer requiring the ***required rectification work***

A copy of the rectification order must be given to the land owner or the owners corporation.

#### **Clause 53 Emergency rectification order**

This clause provides that the registrar may make an ***emergency rectification order*** if satisfied that a serious defect needs to be rectified urgently to protect the health and safety of the building occupants, property or the environment.

The order must state a period of time for the work to be done, and may contain a summary of the reasons for the order.

#### **Clause 54 Rectification orders—more than 1 property developer**

This clause provides that a rectification order may be given to more than one person, for example, the property developer, principal builder and a subsidiary company. The order applies to each party jointly and severally.

#### **Clause 55 Registrar may give rectification order to directors if property developer wound up etc**

This clause provides that where there is a serious defect, or a possible serious defect in a residential building, the registrar may give a rectification order to a director or directors of a property developer that undertook the residential building work.

This clause provides that this can be done if the corporation is subject to a winding-up order, has been placed into administration, receivership or liquidation, or has been deregistered. In considering whether it is appropriate to issue a rectification order against a director or directors of a property developer, the registrar must consider if a latent defects insurance policy or similar insurance policy covers the work required to rectify the serious defect, or possible serious defect, as well as any other matter prescribed in the regulation.

#### **Clause 56 Occupier of land may be required to permit rectification work**

This clause provides that the registrar may order the occupier of the land to permit reasonable access within a stated period. This is called an ***access order***. It is an offence if a person fails to comply with this order.

### **Clause 57 Offence—failing to comply with rectification order**

This clause provides the offences for failing to comply with a rectification order. Various penalty amounts are set out, covering the fault elements of intent, recklessness and strict liability.

## **Division 6.3 Rectification work arranged by Territory**

### **Clause 58 Rectification by Territory—failure to comply with rectification order**

This clause provides for the Territory to engage an **authorised contractor** to enter the land subject to a rectification order, to take the action set out in the order. The authorised contractor must give at least 24 hours' notice to the land owner, and provide a copy of the notice.

### **Clause 59 Offence—hindering or obstructing authorised contractor**

This clause sets out the strict liability offence of hindering or obstructing an authorised contractor undertaking authorised **rectification work**.

### **Clause 60 Damage etc by authorised contractor to be minimised**

This clause provides that the authorised contractor must take reasonable steps to ensure that they minimise damage to the building or site, and to give written notice to the owner if anything is damaged.

### **Clause 61 Compensation**

This clause provides that a person may claim reasonable compensation from the Territory if they suffer loss caused by an authorised contractor. The regulation may prescribe matters for the court to consider when making an order under this section.

### **Clause 62 Protection of authorised contractor from liability**

This clause provides that a person authorised to do rectification work will not incur civil liability for work done honestly in accordance with the Act.

## **Division 6.4 Stop work orders**

### **Clause 63 Stop work orders**

This clause provides that the registrar may give a property developer a **stop work order** if the registrar believes on reasonable grounds that residential building work could result in significant harm or damage.

The order can be issued if a person is required to hold a licence to do the work and no person holds a licence; if regulatory action is, or is proposed to be, taken against the licensee or an associated entity of the licensee; or the licence has restrictions that do not allow the work to be undertaken.

The order must explain the reasons behind the order, the time work must stop, and that it is an offence to not comply with the order.

### **Clause 64 Offence—failing to comply with stop work order**

This clause provides the offence of failing to comply with a stop work order. Various penalty amounts are set out, covering the fault elements of intent, recklessness and strict liability.

### **Division 6.5 Compliance undertakings**

#### **Clause 65 Registrar may accept undertakings**

This clause provides that the registrar may accept a **compliance undertaking** from a property developer, which outlines that the property developer will take action to respond to a serious defect or contravention of this Act or other relevant law.

The property developer may provide the registrar with a financial security to cover the cost of rectifying the defect.

#### **Clause 66 Offence—failing to comply with compliance undertaking**

This clause provides the offence of failing to comply with a compliance undertaking. Various penalty amounts are set out, covering the fault elements of intent, recklessness and strict liability.

### **Division 6.6 Miscellaneous**

#### **Clause 67 Compliance cost notices**

This clause provides that the registrar may give the property developer a **compliance cost notice** requiring the developer to pay the Territory reasonable costs relating to monitoring rectification work, investigations, legal costs and any other matters related to the compliance action.

#### **Clause 68 Appeal against orders etc**

This clause provides that the property developer may apply to the Supreme Court to have a rectification order, stop work order or compliance cost notice revoked or varied, within 30 days of the order being given.

#### **Clause 69 Exercise of powers unaffected by approvals etc**

This clause provides that the registrar is not prevented from taking action under this Part if a certificate of approval has been issued for the building work.

## **PART 7 ENFORCEMENT**

Part 7 sets out the enforcement powers required to support the licensing and regulation scheme established by the Act and provides for the appointment of authorised persons and their powers of entry and to obtain, inspect and copy documents.

### **Division 7.1 Preliminary**

#### **Clause 70 Definitions—pt 7**

This clause defines **authorised person, connected, occupier, offence, premises** and **warrant** for this Part.

#### **Clause 71 Appointment of authorised people**

This clause provides that the director-general may appoint a public servant as an authorised person for this Act.

### **Clause 72 Identity cards**

This clause provides for the identification of authorised persons, by way of an identity card. This clause lists the requirements of the information this card must contain to ensure accurate identification and validity.

The clause establishes an offence of failing to return the identity card within seven days after the person stops being an authorised person. This offence does not apply if the authorised person's identity card is lost, stolen or destroyed by someone else. The maximum penalty for this offence is 1 penalty unit. An offence against this section is a strict liability offence.

## **Division 7.2 Exercise of powers generally**

### **Clause 73 Requirements before certain powers can be exercised**

This clause provides that an authorised person must show an identify card before exercised certain powers under the Act. The authorised person must also tell the affected person the reason for exercising the power and about any relevant offence in relation to the power.

### **Clause 74 Privilege against self-incrimination does not apply**

This clause provides that a person is not excused from answering a question, providing information or a document or other thing under this Part, on the ground that the answer to this question may tend to incriminate the person or expose the person to a penalty.

The clause further provides that any information obtained, directly or indirectly, is not admissible in evidence against the person in a civil or criminal proceeding, other than a proceeding for an offence arising out of the false or misleading nature of the answer, information or document.

## **Division 7.3 Power to obtain information**

### **Clause 75 Direction to give information**

This clause provides that an authorised person may exercise their power, in writing, to direct a relevant person to give them information, a document or other thing within a stated reasonable period if the information, document or thing is reasonably required.

This clause establishes an offence if the relevant person does not take reasonable steps to comply with the direction.

### **Clause 76 Direction to give name and address**

This clause provides that an authorised person may request a person's name and address if they believe the person is involved in an offence against the Act, or may be able to assist an investigation.

This clause establishes a strict liability offence if the person does not provide the information.

#### **Division 7.4 Power to enter premises**

##### **Clause 77 Powers of authorised person to enter premises**

This clause provides that an authorised person may enter premises open to the public, or with the occupier's consent. It also provides that an authorised person may enter premises without consent to monitor compliance with the Act or if an offence may be or has been committed. Entry into residential premises is not permitted without consent or a warrant.

##### **Clause 78 Obtaining consent to entry**

This clause provides that the authorised person must tell the occupier the purpose for entry, that anything seized may be used in court, and that consent may be refused. A written record covering these matters must be provided to the occupier.

##### **Clause 79 General powers on entry to premises**

This clause provides that the authorised person may examine things on the premises, take measurements, samples or images, or request information from an occupier.

This clause establishes an offence if the person does not take all reasonable steps to comply with a direction under this section.

#### **Division 7.5 Warrants**

##### **Clause 80 Definitions—div 7.5**

This clause defines *remote application*, *warrant form* and *warrant terms* for this Division.

##### **Clause 81 Application for warrant**

This clause provides that an authorised person may apply for a warrant to enter premises and exercise their powers. A *remote application* may be made in urgent or special circumstances.

##### **Clause 82 Magistrate may refuse to consider application for warrant until authorised person gives relevant information**

This section provides that the magistrate may refuse to consider an application for a warrant until the authorised person gives the magistrate all the required information.

##### **Clause 83 Decision on application for warrant**

This clause provides that a magistrate may issue a warrant if satisfied there are reasonable grounds to suspect there is an activity connected with an offence under the Act, either underway or in the next 14 days.

The warrant must include **warrant terms** including a statement that the authorised person may enter the premises, details of the offence, that things may be seized, when the premises may be entered, and when the warrant ends.

#### **Clause 84 Warrant issued on remote application**

This clause provides the method for issuing a warrant remotely. This can be done by providing a written copy, or telling the authorised person the warrant terms, date and time the warrant is issued.

This clause also provides the process for completing a **warrant form**, swearing a remote application, and where a warrant may not be authorised.

#### **Clause 85 Announcement before entry under warrant**

This clause provides the process for an authorised person to enter premises. However, the authorised person is not required to comply with the process if immediate entry is required for safety reasons, or to ensure the effective execution of the warrant.

#### **Clause 86 Warrant etc to be given to occupier**

This clause provides that a copy of the warrant must be provided to the occupier, if they are present on the premises while the warrant is being executed.

#### **Clause 87 Occupier entitled to watch search etc**

This clause provides that an occupier may watch the authorised person conduct the search and exercise the powers authorised by the warrant. The occupier is not allowed to do this if it would interfere with the warrant or if they are under arrest.

### **Division 7.6 Power to seize things**

#### **Clause 88 Authorised person may seize things at premises**

This clause provides that the authorised person may seize anything at the premises if they are satisfied that it is connected with an offence, the seizure is necessary to protect the thing, or if it is authorised with the warrant.

The authorised person may remove the seized thing from the premises, or restrict access to it on the premises.

#### **Clause 89 Moving things to another place for examination or processing under warrant**

This clause provides the process for removing a seized thing from a premises. It may only be removed for 72 hours, or a longer time if agreed by a magistrate.

#### **Clause 90 Owner etc may access seized things**

This clause provides that an owner may inspect, record, extract or copy a seized thing.

#### **Clause 91 Person must not interfere with seized things**

This clause establishes a strict liability offence for interfering with a seized thing without approval.

#### **Clause 92 Authorised person must give receipt for seized things**

This clause provides that an authorised person must give a receipt for the seized thing, or place the receipt at the premises. The receipt must include a description of the thing, reason it was seized, authorised person's name and contact details, and the location of the thing.

#### **Clause 93 Return of seized things**

This clause provides that a seized thing must be returned to its owner, or compensation paid if it is lost. This is not required if a prosecution has commenced, the owner is convicted, an infringement notice is served, or a court order is made.

#### **Clause 94 Order disallowing seizure**

This clause provides for an application to be made to the Magistrates Court disallowing the seizure of the thing, within ten days of the seizure. The court may make an order disallowing the seizure if the thing is not connected with an offence, possession of the thing is not an offence or in exceptional circumstances.

### **Division 7.7 Miscellaneous**

#### **Clause 95 Damage etc to be minimised**

This clause provides that the authorised person must take steps to minimise damage to a seized thing, and give written notice if damage occurs.

#### **Clause 96 Compensation for exercise of enforcement powers**

This clause provides that a person may claim reasonable compensation from the Territory if they suffer loss caused by an authorised person. A regulation may be made that prescribes matters for the court to consider when making an order under this section.

## **PART 8 OFFENCES**

Part 8 establishes the offence provisions for the Act.

#### **Clause 97 Offence—false or misleading representation about licence**

This clause provides the offences for making false or misleading representation about a licence. Various penalty amounts are set out, covering the fault elements of intent, recklessness and strict liability.

#### **Clause 98 Offence—failure to comply with licence condition**

This clause provides the offences for failing to comply with a licence condition. Various penalty amounts are set out, covering the fault elements of intent, recklessness and strict liability.

#### **Clause 99 Offence—failure to comply with approved code of practice**

This clause provides the offences for failing to comply with an approved code of practice. Various penalty amounts are set out, covering the fault elements of intent, recklessness and strict liability.

## **PART 9 COMPLAINTS ABOUT PROPERTY LICENCES**

Part 9 establishes the process for making complaints about property developers for the Act.

### **Division 9.1 Preliminary**

#### **Clause 100 Definitions—pt 9**

This clause defines *aggrieved person*, *complainant* and *respondent* for this Part.

### **Division 9.2 Making complaints**

#### **Clause 101 When may someone complain about licensees?**

This clause provides the process for making a complaint about a licensed property developer. A person may complain to the registrar if they believe on reasonable grounds that the licensee has contravened the Act, failed to meet a reasonable standard of work or competence, engaged in improper or unethical conduct, or other conduct set out in the regulation.

#### **Clause 102 Making a complaint on behalf of another person**

This clause provides that a person can make a complaint about a licensed property developer on behalf of the aggrieved person, as an agent or guardian of the person.

#### **Clause 103 Form and contents of complaint**

This clause provides that a complaint against a licensee must be in writing, include the details of the complainant and the licensed property developer, and outline the issues of concern. However, the registrar may accept a complaint if it does not meet all these requirements.

#### **Clause 104 Withdrawal of complaint**

This clause provides that a complaint may be withdrawn at any time by giving written notice to the registrar. The registrar may cease consideration of the complaint or continue to act on the complaint if appropriate to do so, and is not required to engage further with the complainant.

### **Division 9.3 Dealing with complaints**

#### **Clause 105 Notifying licensee about complaint**

This clause provides that the registrar must give the licensed property developer written notice about the complaint.

#### **Clause 106 Consideration of complaint**

This clause provides that the registrar must take reasonable steps to consider each complaint about a licensee, and may consider the complaint in the way the registrar decides.

#### **Clause 107 Registrar may request information or statement**

This clause provides that the registrar may ask the complainant or the licensed property developer for information or to make a statement about the complaint. The request must be in writing, outline the information requested and provide a reasonable timeframe to respond. The timeframe may be extended if required, and the registrar may take further action if the property developer does not respond.

### **Division 9.4 Finalising complaints**

#### **Clause 108 No further action**

This clause provides that the registrar must not take further action on a complaint if satisfied that it lacks credibility, is vexatious, or has been adequately dealt with, such as being referred to another entity.

#### **Clause 109 Registrar may refer complaint or matter to another entity**

This clause provides that the registrar may refer a complaint against a licensee to another entity, if more appropriately dealt with by this entity. This includes entities such as a building inspector, construction occupations registrar, fair work commissioner, commissioner for fair trading, or the work health and safety commissioner. The other entity is not bound to take action on the matter.

#### **Clause 110 Notice of outcome of complaint consideration**

This clause provides that the registrar must provide written notice to the complainant and the respondent about the outcome of the complaint. The registrar must consider taking regulatory action under this Act against a licensee, if grounds exist.

### **Division 9.5 Miscellaneous**

#### **Clause 111 Immunity from liability**

This clause provides that if a person makes a complaint in good faith, the complainant will not incur civil or criminal liability from making the complaint. This does not apply if the complaint is a breach of confidence, professional etiquette or ethics, a rule of professional conduct.

## **PART 10 INFORMATION SHARING**

Part 10 establishes the provisions for sharing licensee information between Territory and non-territory agencies in the Act.

### **Division 10.1 Sharing public safety information**

#### **Clause 112 Definitions—div 10.1**

This clause defines *law of another jurisdiction*, *non-territory agency*, *public safety agency*, *public safety information* and *operational Act* for this Division.

### **Clause 113 Sharing public safety information—territory agencies**

This clause provides that public safety agencies may share or request information, and may impose conditions on how the information is used, stored, and shared.

### **Clause 114 Sharing public safety information—non-territory agencies**

This clause provides that a public safety agency may give information to a non-territory agency if it is satisfied that it relates to a function of that agency and compliance with a public safety law of that jurisdiction. Conditions may be imposed on how the information is used, stored, or shared.

## **Division 10.2 Unauthorised disclosure of protected information**

### **Clause 115 Offences—use or divulge protected information**

This clause establishes that it is an offence to use or divulge protected information. The offences do not apply if the information is shared under law, in court, or with consent. Various penalty amounts are set out, covering the fault elements of intent, recklessness and strict liability. The maximum penalty is 50 penalty units, imprisonment for 6 months, or both.

## **PART 11 NOTIFICATION AND REVIEW OF DECISIONS**

Part 11 establishes the process for notification and review of decisions in relation to an affected person mentioned in schedule 1, column 4.

### **Clause 116 Definitions—pt 11**

This clause defines terms *ACAT reviewable decision*, *affected person*, *decision-maker*, *internally reviewable decision*, *internal review notice* and *reconsideration application* for this Part.

### **Clause 117 Applications for reconsideration**

This clause provides that an affected person may make an application for reconsideration of an internally reviewable decision, and sets out the requirements for the application. This application does not stay the internally reviewable decision or prevent action being taken.

### **Clause 118 Reconsideration of internally reviewable decisions**

This clause provides that the decision maker must reconsider the internally reviewable decision, and confirm, vary or set aside the decision, within 30 days of receiving the application. The decision maker must be a different person to the original decision maker. If the application is not considered within 30 days, the decision is taken to have been confirmed.

### **Clause 119 Reviewable decision notice**

This clause provides that if the decision-maker makes an ACAT reviewable decision, the decision-maker must give a reviewable decision notice to the registrar and each affected person.

## **Clause 120 Applications for review of ACAT reviewable decisions**

This clause provides that an affected person may apply to the ACAT for a review of an ACAT reviewable decision.

## **PART 12 MISCELLANEOUS**

Part 12 establishes a range of miscellaneous provisions for the Act.

### **Clause 121 Codes of practice**

This clause provides that the Minister may approve a code of practice for relevant property developers. This includes licensees, and any other person prescribed by regulation. The code of practice is a disallowable instrument. A licensee must comply with an approved code of practice. This is a key element of the property developer regulation framework and is subject to further engagement with industry and key stakeholders during the implementation phase.

### **Clause 122 Competency requirements for property developers**

This clause provides that the Minister may determine competency requirements that a person must have to be licensee, such a qualifications, experience, or continuing professional development. This determination will be a disallowable instrument, and a licensee must comply with the requirements. The competency requirements will be developed in close consultation with industry and key stakeholders.

### **Clause 123 Protection of public officials from liability**

This clause provides that a public official will not be held civilly liable for honest conduct under the Act or territory law, with liabilities attaching instead to the Territory.

### **Clause 124 Incorporating, applying or adopting documents in regulations and instruments**

This clause provides that a regulation or instrument made under this Act may incorporate, apply, or adopt (with or without change or modification) a law or an Australian Standard as in force from time to time or another instrument as in force from time to time.

This clause disapplies section 47(6) of the *Legislation Act 2001*. This disapplication will allow a consistent approach to the incorporation of instruments/documents whether copyrighted or not or otherwise publicly available.

This clause requires the director-general, to make the instrument available on the ACT legislation register, for inspection at an ACT Government office or on an ACT Government website.

An instrument that is incorporated, applied, or adopted is not enforceable unless it has been made accessible in accordance with the above.

### **Clause 125 Determination of fees**

This clause provides that the Minister may determine fees for the Act and that a determination is a disallowable instrument.

#### **Clause 126 Regulation-making power**

This clause provides the Executive with the power to make regulations for this Act.

#### **Clause 127 Review of Act**

This clause provides that the Minister must review the operation and effectiveness of the Act after five years, and present a report on the review to the Legislative Assembly.

### **PART 13 TRANSITIONAL**

Part 13 sets out that the transitional provisions for the Act.

#### **Clause 128 Transitional regulations**

This clause provides that a regulation may set out transitional requirements. The regulation may modify this part of the Act in relation to anything that, in the Executive's opinion, is not, or is adequately or appropriately, dealt with in this part.

#### **Clause 129 Expiry—pt 13**

This clause provides that this part expires seven years after the day this Act commences.

### **PART 14 CONSEQUENTIAL AMENDMENTS**

Part 14 sets out the consequential amendments made by the Act.

#### **Clause 130 Legislation amended—sch 2**

This clause provides that the Act amends the legislation mentioned in Schedule 2.

### **Schedule 1 Reviewable decisions**

#### **Part 1.1 Internally reviewable decisions**

This schedule provides a list of internally reviewable decisions. Internally reviewable decisions outlined in the schedule relate to:

- refusing to consider a licence or renewal application, or to consider the application further;
- refusing to give or renew a licence;
- imposing conditions on a licence;
- varying or refusing to vary a licence; and
- refusing to cancel a licence.

Column 4 of this schedule provides the affected person who can apply for the review of each item listed in Column 2.

#### **Part 1.2 ACAT reviewable decisions**

This schedule provides a list of ACAT reviewable decisions. ACAT reviewable decisions outlined in the schedule relate to:

- refusing to approve an approval application;
- imposing conditions on approval;
- varying, or refusing to vary approval;
- revoking or refusing to revoke approval;
- taking regulatory action;
- immediately suspending or cancelling a licence, or refusing to do so;
- confirming, varying or setting aside an internally reviewable decision.

Column 4 of this schedule provides the affected person who can apply for the review of each item listed in Column 2.

## **Schedule 2 Consequential amendments**

### **Part 2.1 Building Act 2004**

#### **[2.1] New section 27 (1) (ca)**

This clause provides that a certifier must not consider an application for building approval for residential building work by a property developer unless the application includes the licence number, and a statement that the property developer is not restricted under the licence from doing the work.

#### **[2.2] New section 27 (1A)**

This clause provides that a regulation may exclude the requirement for each person arranging for building work to hold a property developer licence allowing them to carry out that work.

#### **[2.3] Section 27 (2), new definitions**

This clause provides new definitions of *property developer licence*, *related entity*, *residential building*, and *residential building work* for this Act.

#### **[2.4] New section 28AA**

This clause provides that a certifier can only grant approval for residential building work if a person is required to hold a property developer licence holds said licence and a statement that the property developer is not restricted under the licence from doing the work.

#### **[2.5] New sections 48A and 48B**

This clause provides that the building licensee in charge of the building may give the certifier a draft building manual for the building work and apply to the certifier for approval of the manual. A building manual provides information for the ongoing management and maintenance of the building.

The certifier may only approve the manual if it complies with the requirements in the regulation. A strict liability offence is established if the manual includes information that is materially false or misleading.

**[2.6] New section 69 (1) (c)**

This clause provides that a certificate of occupancy must not be issued for residential building work by a property developer for work that requires a licensee unless the application includes the licence number and a statement that the property developer is not restricted under the licence from doing the work.

**[2.7] New section 69 (1) (d)**

This clause provides that, if required by regulation, a certificate of occupancy must not be issued for residential building work by a property developer unless the application includes an approved building manual.

**[2.8] Section 69 (2C) (c)**

This clause updates the reference to Part 6 of the Act.

**[2.9] New section 69 (5)**

This clause inserts a new definition of *residential building work*.

**[2.10] Section 73**

This clause updates the reference to Part 6 of the Act.

**[2.11] Part 6 heading**

This clause updates the reference to Part 6 of the Act.

**[2.12] Section 84, new definition of *property developer***

This clause inserts a new definition of *property developer*, in relation to *residential building work*.

**[2.13] New section 88 (2A)**

These clauses clarify how the warranty provisions under the Act will operate for residential building work by a property developer.

**[2.14] New section 88 (4A) and (4B)**

These clauses clarify how the warranty provisions under the Act will operate for residential building work by a property developer.

**[2.15] Section 89 heading**

**[2.16] Section 89**

This clause adds property developer to the section in the Act on builder's liability.

**[2.17] New division 6.2B**

This clause provides that a party affected by defective building work may give notice to a builder and the property developer within two years of completion of the building,

requiring the defective work to be rectified. They may also claim damages arising from the defect.

This clause does not affect existing warranty provisions, and does not apply to residential building work done or contracted before the commencement of the section.

#### **[2.18] New division 6.3A**

This clause provides that a regulation may establish a requirement for latent defects insurance for residential building work.

#### **[2.19] Dictionary, definition of actuary etc**

#### **[2.20] Dictionary, new definitions**

#### **[2.21] Dictionary, definition of prudential standards etc**

These clauses update the dictionary for the Act.

### **Part 2.2 Building (General) Regulation 2008**

#### **[2.22] New section 30A (c) (via)**

This clause provides for the licence and contact details of a property developer to be included on signage for building work.

#### **[2.23] New section 30A (2)**

This clause inserts a new definition of *residential building work*.

### **Part 2.3 Civil Law (Property) Act 2006**

#### **[2.24] Section 260 (1), new note**

This clause provides a new note cross-referencing the disclosure requirements of the *Civil Law (Sale of Residential Property) Act 2003*, div 2A.3 for off-the-plan contracts.

### **Part 2.4 Civil Law (Sale of Residential Property) Act 2003**

#### **[2.25] New section 9 (1) (ja)**

This clause provides new matters about property developers to be included in the list of required documents for the sale of residential property.

#### **[2.26] Section 9 (4), new definition of off-the-plan contract**

This clause inserts a new definition of *off-the-plan contract*.

#### **[2.27] New divisions 2A.1 to 2A.3**

This clause introduces new definitions to Part 2A of the *Civil Law (Sale of Residential Property) Act 2003*. These include definitions of **Commonwealth or State entity**, **related entity**, and **territory entity**.

This clause establishes an offence if the seller of an off-the-plan contract is not licenced. This does not apply to a Territory entity, a Commonwealth or State entity, a

wholly owned subsidiary of a licenced property developer, or a person excluded by regulation.

This clause establishes an offence if a person publishes an advertisement for an off-the-plan contract and does not include the property developer licence number of the seller or related entity of the seller. This does not apply to a Territory entity, a Commonwealth or State entity, or a person excluded by regulation.

This clause establishes an offence if a person publishes an advertisement for an off-the-plan contract that is false or misleading in a material particular.

This clause provides new disclosure statement requirements for off-the-plan contracts. The seller must provide the details of the property developer, the licence number and information about the licenced property developer register. If the disclosure statement is not provided, a buyer may rescind the contract.

This clause provided modified requirements for off-the-plan contracts for existing developments.

#### **[2.28] to [2.40]**

These clauses update the Act to reflect the new disclosure requirements.

### **Part 2.5 Planning Act 2023**

#### **[2.41] New division 7.3.3**

This clause provides that the territory planning authority must not accept a development application for residential building developments if a licence is required for the work and does not restrict the proposed residential building work from taking place.

This clause provides the transitional provisions for amending development applications by a property developer. The territory planning authority must not accept a significant amendment to the development approval, unless the property developer is licensed and not restricted under their licence.

#### **[2.42] New section 187 (1) (f)**

This clause provides that a territory planning authority approval must include a condition identifying that work may only be done or arranged by a person who holds a property developer licence.

#### **[2.43] New section 187 (6)**

This clause defines *related entity* for that section.

#### **[2.44] Dictionary, new definition of property developer licence**

This clause inserts the definition of *property developer licence* into the Act's dictionary.