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LEGISLATIVE ASSEMBLY FOR THE
AUSTRALIAN CAPITAL TERRITORY

BUILDING BILL 2003

EXPLANATORY STATEMENT

Circulated by authority of the
Minister for Planning
Mr Simon Corbell MLA

Building Bill 2003

Background

The Building Bill 2003 ("the Bill") replaces the *Building Act 1972* and the Building Regulations 1972 ("the superseded building legislation") in conjunction with the Construction Occupations (Licensing) Bill 2003 ("the new licensing scheme").

That bill sets up a single system of licensing for the construction occupations of builders, building surveyors (certifiers), drainers, electricians, gasfitters, plumbers and plumbing plan certifiers. The Bill omits licensing provisions made superfluous by the new licensing scheme and modernises many of the remaining provisions adapted from the superseded building legislation.

Minor instances of modernisation include the omission of superseded provisions, for instance those dealing with asbestos and legionella, introduction of notes and examples, and the introduction of a modern system of inspection powers. Some provisions have been more comprehensively updated to remove ambiguous or obstructive regulation and a few introduce new policy objectives. These include:

- the right of building surveyors to issue stop notices and other building notices when they are involved;
- the introduction of start of work notices for builders (building commencement notices).

Penalties

The penalties generally correspond to those in the superseded building legislation. Most offences are now offences of strict liability in accordance with current legal policy for regulatory offences with small or moderate penalties. That means that conduct alone is sufficient to make the defendant culpable. However, under the Criminal Code, all strict liability offences will have a specific defence of mistake of fact. The potential consequences for future owners and users of buildings and the public of a failure to have construction services carried out adequately are the justification for strict liability provision. Where appropriate the Bill adds specific additional defences relevant to conditions in the construction industry.

Outline

The key provisions of the Bill cover:

- compliance with the Building Code of Australia (which mainly applies to builder's and building certifiers);
- building plan approvals (which mainly applies to building certifiers);
- doing building work (which mainly applies to building certifiers);
- inspection and certification of building work (which mainly applies to builders and building certifiers);

- residential building warranties and risk coverage (through insurance or fidelity fund scheme arrangements covering land owners against certain risks of loss from breach of residential building warranties by builders).

The *Building Act 1972* had extensive provisions covering the handling of asbestos in relation to buildings. The Bill has a transitional provision intending to ensure that those provisions continue to apply for a certain period despite the repeal of the *Building Act 1972*. In virtually all other cases, other than those relating to the above-mentioned builder licensing provisions, the *Building Act 1972*'s provisions are catered for in the provisions of the Bill. An exception is the provisions in the *Building Act 1972* that dealt with cooling tower warm water systems and mechanical ventilation systems in buildings. Those provisions were made redundant by the *Public Health Act 1997*.

Strict Liability Offences

Most of the offences in the Bill are strict liability offences. A strict liability offence under section 23 of the Criminal Code means that there are no fault elements for any of the physical elements of the offence. That means that conduct alone is sufficient to make the defendant culpable. However, under the Criminal Code, all strict liability offences will have a specific defence of mistake of fact. Clause 23(3) of the Criminal Code provides that other defences may still be available for use in strict liability offences. Strict liability offences do not have a mental element, termed 'mens rea'. However, the actus reus, the physical actions, do have a mental element of their own, for example, voluntariness. For that reason, the general common law defences of insanity and automatism still apply as they go towards whether a person has done something voluntarily, as well as whether they intended to do the act.

Notes on clauses

Part 1 Preliminary

Part 1 deals with the administrative elements of the Bill.

Clause 1 gives the formal name of the Bill. **Clause 2** stipulates that the Bill commences on the commencement of clause 6 of the *Construction Occupations (Licensing) Bill 2003* and provides a note regarding automatic commencement. Clause 6 of the *Construction Occupations (Licensing) Bill 2003* defines what a ***construction practitioner*** is and what a ***construction service*** is, which relates to other provisions in that Bill that deal with licensing of ***builders*** and ***building surveyors***.

Clause 3 explains that the dictionary contained at the end of the Bill is a part of the Bill, and provides notes to explain how the definitions are structured and how they apply to the Bill. **Clause 4** explains that the "notes" that appear in the Bill are only explanatory, and not part of the Bill.

Clause 5 explains that provisions in other legislation apply to offences committed under the Bill. The notes in the clause explain the application of the *Criminal Code* and penalty units under the *Legislation Act 2001* to the Bill.

Part 2 Important concepts

Part 2 outlines some of the fundamental concepts that provide the framework for the operation of the Bill. Definitions used are mainly based on those provided in the *Building Act 1972*, but some are more extensive to clarify where they do or don't apply.

Clause 6 defines the term ***building work***. It explains that it means work in relation to the erection, alteration or demolition of a building, and includes disposal of waste materials generated by the alteration of a building other than a building excluded under the regulations, or by the demolition of a building and it includes work in relation to repairs of a structural nature to a building. The clause also allows regulations to exempt a kind of work from the definition of building work, or to include a kind of work in the definition of building work. It is intended that the term refer to the doing of the above-mentioned work rather than refer to the building materials or building parts that the work is in respect of.

Clause 7 defines the term ***building.*** It explains that it includes a structure on or attached to land and an addition to a building and a structure attached to a building and part of a building, whether the building is completed or not. The clause provides an example to help explain what is meant by the term "part of a building"—footings poured for a building that is being built. It has a note about the application of the example. The clause also explains that the term ***building*** does not include a vehicle or craft that is not used or adapted for use as a class of building or structure as classified under the Building Code of Australia or a transportable building, mobile home, caravan or similar that is not used for long-

term habitation and that is readily transportable without disassembly or without removal from associated components including a footing, pier, stump, rigid annexe or an attached building or similar. The clause also provides that that the term ***building*** does not include something exempted under the regulations. The clause endeavours to remove doubt about the meaning by explaining that something is not excluded from the definition of ***building*** only because it is temporary or novel. The clause sets out examples of temporary or novel buildings—a building used in connection with a fair, circus, carnival, celebration, market, show, concert, display, exhibition, competition, training event, recreational event or publicity event is not excluded on the basis of its temporary or novel nature. The clause also provides a note on the application of the example.

Clause 8 defines the term ***structure***. It explains that the term ***structure*** includes a fence, retaining wall, swimming pool, ornamental pond, mast, antenna, aerial, advertising device, notice or sign; and a thing prescribed under the regulations as a structure. It also provides that that the term ***structure*** does not include something that is part of a machine or mechanical plant unless it is part of something classified as a building or structure by the building code or something prescribed under the regulations for the clause.

The term ***specialist building work*** is defined in **clause 9** as the installation of a swimming pool and also as the demolition of a building and also includes work prescribed under the regulations as ***specialist building work***. That is necessary to facilitate restrictions on the kind of licenses under the Bill that authorise those kinds of work. An intention is to ensure only appropriately experienced licensees undertake ***specialist building work*** due to inherently high risks associated with demolition (risk of collapse) and pool fencing and barriers (risk of drowning).

Clause 10 defines the term ***basic building work*** to mean building work that is erecting a prefabricated building if the building is class 10a, or building work that is the erecting an outbuilding if the outbuilding is class 10a, or building work that is installing fireplaces or solid-fuel heaters, or building work that is ***non-structural work***. It explains that the term ***basic building work*** does not include ***specialist building work***. It explains what is meant by the term ***non-structural work*** for the clause. It means work on a part of a building that does not, or is not intended to, carry a structural load imposed or transmitted by another part of a building and includes work on non-load bearing walls, doors, partitioning, reticulated pipework, ventilation ductwork and building fit-out items. It does not include work that may affect the structural integrity of a structural element of a building, or weaken or remove, completely or partly, the structural element, if the element is installed in a way that it carries, or can carry, a load of part of a building. It also does not include work that involves the use of a structural element to carry, or to possibly carry, a structural load of part of a building. The clause also provides 2 examples of work that is not included in the term non-structural work, and a note about the application of the examples. The examples are—1) the installation of a new storey on a building; and 2) underpinning a subsiding building.

Clause 11 specifies that the provisions of the Bill do not affect the operation of any other law in force in the ACT relating to land use or to the provision of services for a building. It sets out several examples of laws not so affected and a note on the application of the examples. The examples are the—*Electricity Safety Act 1971; Utilities Act 2000; Scaffolding and Lifts Act 1912;* and *Water and Sewerage Act 2000.*

The term ***exempt building*** is defined by **clause 12** to mean buildings prescribed under the regulations. It also provides a note explaining the term is used to narrow the application of parts 3, 5 and 6 of the Bill. An intention is to allow limited deregulation in respect of buildings that the definition covers, as the benefits of regulating some kinds of buildings, particularly minor buildings, do not always justify the cost and effort needed for their regulation.

Clause 13 describes some circumstances where temporary buildings are excluded from the application of the Bill. The circumstances are that the temporary building is erected on the site of building work for the erection or alteration of another building and building approval has been obtained for the building work and the temporary building is to be removed on completion of the building work. An intention of the provision is to exclude site-sheds and site-offices, for example, from the application of the Bill, in the circumstances described in the clause.

Clause 14 entitles the Minister to temporarily exempt, in writing, a building from the application of the Bill or a provision of the Act for a period stated in the exemption. It explains that the exemption period must not exceed 1 year, and that if the exemption has no exemption period stated then the period for which the exemption is in force will be 1 week. It permits the exemption to be conditional. The clause provides 2 examples of conditions and a note about the application of the examples. The examples of conditions are—1) restricting number of people allowed in the building; and 2) requiring the fire brigade to be present outside the building when it is used for a stated event. The clause also provides that an exemption is a disallowable instrument and a note about notification of such instruments. An example of an intention of the provision is to cater for situations where the holding of an important event would otherwise be jeopardised by the late discovery of circumstances that would make the venue for the event unusable because of the Bill's application to it. For example, it is planned to hold an international sporting event at venue with a large grandstand, but it is discovered that structural alterations done to the grandstand require a certificate of occupancy under the Bill. Without that certificate it is unlawful under the Bill to occupy the grandstand. If the required certificate cannot be obtained in time for the event, the Minister may exempt the stadium from the application of the provisions of the Bill that would otherwise make occupation of the grandstand unlawful. A condition of the exemption could include the provision of a structural engineer's certification demonstrating the structural adequacy of the grandstand, for example.

Part 3 Building Work

Part 3 sets out requirements for doing building work, from the appointment of certifiers, through the plan approval process and carrying out the work, to completion of the building work. The process is basically the same process provided in the *Building Act 1972*, except that the Bill additionally requires a building commencement notice covering matters dealt with in other ways by the *Building Act 1972*.

Clause 15 provides that part 3 of the Bill does not apply to building work in relation to an ***exempt building***. (Clause **12** defines the term ***exempt building***). An intention is to partly deregulate doing building work in relation to such buildings as the cost and effort required for their regulation does not justify that regulation, due to the buildings being of low to moderate cost and complexity.

Clause 16 defines what the term ***stage*** means for part 3 of the Bill. It explains that where it applies to building work it means a ***stage*** prescribed under subclause **43** (1) of the Bill.

Clause 17 defines various terms for the purposes of Division 3.2 of the Bill. It explains that ***certifier*** does not include the term ***government certifier***, and for the term ***eligible person*** for building work—see clause **18**, and that the term ***government certifier***, for building work, means a person who is appointed under clause **20** (4) of the Bill for the work.

Clause 18 establishes that a licensed construction practitioner is referred to in that clause as an ***eligible person***. It sets out the eligibility criteria that a licensed construction practitioner must satisfy in order to be eligible to be appointed ***certifier*** or ***government certifier*** for building work. Those criteria are that that person is entitled under the Construction Occupations (Licensing) Bill 2003 to perform services as certifier for the work, and is qualified under the regulations to be appointed for the work.

Appointing a certifier or government certifier

Clause 19 provides procedures for appointing certifiers (which by definition for Division 3.2 excludes ***government certifiers***), and explains some ways that the appointment can end. It explains that the owner of land where it is proposed to carry out building work may appoint an ***eligible person*** (the ***certifier***) as certifier for the work. The clause has a note that an appointment must be in writing (see Legislation Act, s 206). The clause describes 3 circumstances that will cause the appointment to end. They are as follows: the certifier stops being an eligible person, or the owner of the land revokes the appointment by written notice given to the certifier, or the certifier resigns the appointment. However, it also limits the circumstances under which a certifier can resign that appointment. The purpose of that limitation is to protect the public interest that lies in ensuring the construction industry has reasonable forewarning of the withdrawal of the certifier's services, for without those services building work cannot lawfully

progress past various inspection stages. It is theoretically possible for 1 certifier to be appointed in respect of every construction project in the ACT, and thus a withdrawal of that certifier's services in cases of such a large number of projects can cause significant disruption to the industry.

The limitation on circumstances under which a certifier may resign are where the construction occupations registrar has approved of that resignation, in writing, and where written notice of the resignation has been given to the landowner that made the appointment. However, the clause also sets out the only circumstances under which the construction occupations registrar may approve of the resignation of a certifier—that the construction occupations registrar is satisfied that the certifier cannot exercise his or her functions in relation to the building work because of mental or physical incapacity, or the certifier has arranged for another certifier to take over the certifier's functions in relation to the building work, or it is otherwise appropriate to approve the resignation. It is intended that a certifier's appointment create a nexus with the parcel of land where the respective building work is, or is to be, carried out. In that way, the appointment as certifier should be able to withstand transfer of title of that land. It is intended that the appointment continue despite such a transfer occurring, and the new titleholder ought to be able to take the previous titleholder's appointment of the certifier as continuing until something ends it.

Clause 20 provides procedures for appointing government certifiers (which by definition for Division 3.2 excludes ***certifiers*** that are not ***government certifiers***), and explains some ways that the appointment can end. It explains that it only applies to building work if the last certifier appointed for the work is no longer the certifier for the work. The clause sets out the circumstances under which a certifier is taken to no longer be the certifier for purposes of that clause. They relate to the certifier—

not having viable licence because it is suspended for longer than 3 months, or because it has been cancelled; or

having resigned the appointment as certifier under clause **19**; or

being dead; or

not being covered by insurance required under the Construction Occupations (Licensing) Act 2003 for the occupation class relating to the building certifier.

Clause **20** also provides that the owner of the land where the building work is being carried out (or proposed to be carried out) may apply to the construction occupations registrar for the appointment of a ***government certifier*** for the work. The clause provides a note about the use of approved forms. It entitles the construction occupations registrar to have discretion to appoint a ***government certifier*** if the registrar is satisfied that the criteria prescribed under the regulations are met, and it allows the regulations to prescribe what must accompany the application for appointment. The clause also defines what the term ***licence***

means for the clause—a building surveyor licence under the Construction Occupations (Licensing) Act 2003.

A role of the government certifier is to provide a safety net to allow certification work to continue in some circumstances where the previous certifier is no longer viable and it is difficult to obtain replacement certifier services from the public sector. The nature of building certification work is such that where that certification work needs to be carried on by a different certifier to the previous, that certifier may need to rely on documentation that the previous certifier was required to produce in relation to the work. To cater for such situations **clause 21** entitles the government certifier to require the person that was the certifier (or last certifier) for building work to give the government certifier any building document the person has in relation to the work within the time period stated in the requirement. The clause provides that that requirement must be by written notice and the above-mentioned time period for giving the document must not be less than 2 weeks after the notice was given.

The clause also creates a strict liability offence in respect of a person where the person has been given a notice mentioned above requiring the person to give documentation but the person contravenes that notice. The clause specifies a maximum respective penalty of 50 penalty units for the offence, the same amount for the corresponding regulatory offence in the *Building Act 1972*.

Clause 22 provides some civil and criminal liability protections for government certifiers. It provides that a government certifier does not incur civil or criminal liability for an act or omission done honestly as a government certifier. The clause also provides that a civil liability that would, apart from the clause, attach to the government certifier attaches instead to the Territory.

Clause 23 sets out criteria intended to prevent some conflicts of ***interest*** that could arise if a person has an interest in building work and is also the certifier for that work—for example if the certifier owns the land that the work is built on. It provides that a licensed construction practitioner is not entitled to perform services as a certifier in relation to building work if he or she has an interest in the work. The clause explains what the concept of having an ***interest*** means in that clause—a licensed construction practitioner has an ***interest*** in building work if the practitioner, or a person related to the practitioner has a legal or equitable ***interest*** in the land where the building work is, or is to be, carried out, or has prepared, or intends to prepare, drawings intended to be used in relation to the construction of the building work or has carried out, or intends to carry out, any of the building work, or has a financial ***interest*** in the construction or completion of the building work. The clause further extends that prohibition to people that are related to the practitioner. It explains when a person can be taken as being related to the above-mentioned practitioner. The clause provides that, for the clause, a person is related to a licensed construction practitioner if the person is—a person with whom the practitioner has: a personal, professional, commercial or financial relationship,

or an employer or employee of the practitioner, or a company of which the practitioner is a director or in which the practitioner holds a share. The clause also provides an exemption from its above-mentioned prohibition grounds relating to where the practitioner has prepared, or intends to prepare, drawings intended to be used in relation to the construction of the building work. The exemption is that that prohibition does not prevent a certifier from sketching a required design solution as part of a direction under clause **44** (2). That clause requires a certifier to give directions that may include drawing a sketch plan of building work to be done. In that case the need for urgent design information outweighs the need to protect from the conflict of interest arising from being both the designer and approver.

The provisions of the clause are necessary to protect the public interest that lies maintaining the independent nature of the certifier's role in checking buildings and building plans for compliance with requirements. Certifier's are privatised regulators and therefore it is beneficial that their regulatory function be kept free of the kinds of conflicting interests referred to in the clause.

Clause 24 creates a strict liability offence against a person if the person fails to tell the construction occupations registrar that they were appointed as a certifier for building work covered by a building approval, or that such an appointment ended. The clause explains that it only applies where a building approval has been issued for the work and the telling did not occur within 7 days after the day the person is appointed. That will assist the registrar's function as the central point of recording the certifiers' statuses. Certifiers are privatised regulators, and as such it is important that their clients and the agency administering the Bill have precise records of the certifiers' status.

The offence is necessary to promote compliance with the clause as failure to comply has potential for serious consequences, particularly in relation to high cost building projects. Only duly appointed certifiers are entitled to provide certification services under the Bill, and building work cannot lawfully progress beyond various inspection stages without that service. Where a client of a certifier relies on obtaining those services from a person purporting to be a certifier, but the person is not, the certifications are invalid. Invalid certifications put the respective building at risk of being constructed other than in accordance with required standards and codes, possibly rendering the building unsafe or unusable. Retrospectively obtaining replacement, but valid, certifications is difficult or impossible where critical structural elements have been concreted over. The clause specifies a maximum penalty of 1 penalty unit for the offence, the same amount for the corresponding regulatory offence in the *Building Act 1972*. It is not set at a higher number of units to recognise that an offence can be committed merely from unintended lateness of lodging paperwork.

Building Approvals

Part 3 (Building Work) creates critical statutory approvals and checking procedures for building plans and building work. They are basically the same relevant procedures provided in the *Building Act 1972*. Ensuring the procedures are followed in full has high public interest in that the procedures seek to ensure buildings are safe, sound, healthy and accessible. A contract purporting to require building work to be done other than in accordance with the part is at odds with the public interest that lies in following the procedure. Therefore **clause 25** specifies that a provision in a contract or agreement that limits or modifies, or purports to limit or modify, the operation of part 3, including that clause, in relation to a certifier or building work, is void.

Clause 26 entitles the owner of a parcel of land to apply in writing under that clause to the certifier for a building approval for building work to be carried out on the land. The clause has a note that at common law, an agent may make an application on the owner's behalf. The clause sets out a list of things that the application must comply with. The list states that the application must—be accompanied by the number of copies of the plans relating to the proposed work prescribed under the regulations and by a waste management plan if the work involves the kinds of demolition or alteration detailed in the list. The clause has a note about the use of approved forms. The clause also entitles the regulations to require the application to contain other details or be accompanied by other material.

Clause 27 sets out the circumstances under which a certifier can consider an application for a building approval and it prohibits the certifier from considering such applications outside of those circumstances. The circumstances broadly relate to the plans complying with plan requirements, consultations and consents having been attended to as required, the agent's authority being in writing by the owner (where an owner's agent made the application), and the ***training levy*** having been paid. The clause defines that the term ***training levy*** means, for the clause, the training levy under the *Building and Construction Industry Training Levy Act 1999*. That Act relies on the *Building Act 1972* for the provisions requiring payment of the levy and therefore will rely on the Bill to continue that requirement.

Clause 28 sets out the requirements that apply to certifiers in issuing a building approval. It limits its application to where the following 3 criteria are met—an application for a building approval is made to the certifier under clause **26** of the Bill, and the certifier may consider the application, and clause **30** (External design and siting considerations) of the Bill does not apply to the application. The clause requires the certifier to issue the building approval if satisfied on reasonable grounds that the plans meet each approval requirement under clause **29**. It is necessary to not allow the certifier any discretion in issuing the approval, where in law it is appropriate to issue it, to force the certifier to diligently attend to issuing such approvals. That is because the certifier provides a mandatory privatised

regulatory function which if undertaken with a lack of due diligence can cause unreasonable delay in building construction progress.

The clause requires the building approval to be marked on, attached to or partly marked on and partly attached to, each page of the plans it relates to. It also requires the certifier to initial and mark his or her licence number on each page of the plans. An intention there is to remove doubt about which pages and plans are approved, and which are not, and who made an approval. The clause also provides a note about the use of approved forms. Where the plans are too big to be practical to attach the approval to every page the clause also allows the certifier to instead mark each page of the plans with an indication that the approval, or part of the approval, is in a separate document.

The clause also requires the certifier to give a copy of the approval and the relevant plans as soon as practicable to the person who applied for the approval and to also give to the construction occupations registrar a copy of the approval, and a copy of the relevant plans, and if notification of the certifier's appointment has not previously been given to the registrar—that notification. The clause specifies that those things are required to be given to the construction occupations registrar within 7 days of the day of issuing the approval. The clause also provides notes about the use of approved forms and determined fees. The requirement to give copies to the registrar is needed to promote diligence in helping keep the registrar's relevant records up to date as the registrar provides the one and only central repository for all such records and relies on them to administer relevant laws.

Clause 29 sets out criteria relating to approval of plans. Each criterion is referred to as an ***approval requirement.*** A criterion is: if the plans are for the substantial alteration of a building—the building as altered will comply with this Bill. That criterion has a note to see subclause (2) for the meaning of the term ***substantial alteration***. An intention of that criterion is that the amount of alteration that a building has undergone over a certain period of years needs to be considered together with the alterations proposed in the plans to determine if together that amounts to a ***substantial alteration*** of the building. Where that is the case, a plan approval prerequisite is that the plans must show work which when carried out in accordance with the plan will result in the entire building complying with the Bill, rather than only a smaller part of the building so complying. The provision is necessary to reduce the incidence of buildings falling further and further behind modern building code standards with the passage of time. The provision is necessary for ensuring certain old buildings are entirely brought up to current technical standards when they have been substantially altered over time.

Another criterion set out in the clause is that if the plans are for the erection of a building—the building as erected will comply with the Bill. The clause has a note that a reference to an Act includes a reference to the statutory instruments made or in force under the Act, including regulations and the building code (see *Legislation Act*, s 104).

Another of the clause's criterion is if a waste management plan is required to accompany the application—the plan is adequate. An intention is to reduce waste of used building materials and encourage their reuse. The final criterion of the clause is that the building as proposed to be erected or altered will be structurally sufficient, safe and stable. The clause allows the regulations to prescribe when an alteration to a building is a ***substantial alteration***.

Although the clause requires, in essence, plans to depict buildings that will comply with the building code when erected, it explains that a building does not fail to comply with the clause only because the plans for the building or alteration contain something to which the building code does not relate. The clause also sets out criteria, which must all be satisfied to enable a waste management plan to be taken as being adequate for the purposes of the clause. They are—the plan satisfies any requirements prescribed under the regulations, and there is a ***recycling facility*** for the reuse or recycling of material mentioned in the plan and the plan states that the material will be disposed of, if practicable, at the facility. The clause entitles the Minister to The Minister may, in writing, declare that a facility outside the ACT is suitable to reuse or recycle stated material. It stipulates that such a declaration is a notifiable instrument and has a note about notification of instruments. The clause also defines for the clause what the term ***recycling facility***, for material, means—a facility in the ACT where the material is reused or recycled, or a facility outside the ACT that the Minister has declared is suitable to reuse or recycle the material under subclause (5).

Clause 30 prohibits a certifier from issuing an application for a building approval if—because of the ***external design*** or siting of a proposed building, or of a building as proposed to be altered, the carrying out of the building work to which the application for the approval relates would result in the contravention of the Bill or any other law in force in the ACT. However it explains that that prohibition does not apply to building work forming part of a development that is not required to be approved under the Land (Planning and Environment) Act. The clause also defines what the term ***external design***, in relation to a building, includes—anything affecting the appearance of the exterior of the building.

Clause 31 entitles the owner of land to apply to a certifier for approval of amendment of plans relating to building approval on the land. It sets out the circumstances that must all exist for the clause to apply—a building approval must have been issued for the building work and the owner of the parcel of land where the building work is being, or is to be, done proposes to amend the plans for the work. The clause also has a note about the use of approved forms.

Clause 32 requires a certifier to approve the plans as amended and amend the building approval, but only if all the criteria set out in the clause are satisfied. The clause only applies if an application under clause **31** of the Bill for the amendment of plans has been made to a certifier. A criterion is that the approval requirements set out in the Bill, so far as they apply to plans, are satisfied in relation to the plans as amended. Another criterion is that the application would not be refused

because of clause **30** (External design and siting considerations) of the Bill if it were an application for a building approval. The final criterion is that a building built to the amended plans would not be ***significantly different*** from a building built to the unamended plans. The clause allows the regulations to prescribe when a building built to amended plans is ***significantly different*** from a building built to unamended plans. The clause also has a reminder note about that. The clause also requires the certifier to tell the applicant in writing that the application is refused if the certifier cannot approve the plans as amended.

Clause 33 sets out what the certifier is required to do if the certifier approves plans as amended under clause **32** of the Bill. The provisions mirror those that the Bill requires the certifier to do when the certifier approves an unamended plan under the Bill, in relation to marking the approval on the plans and giving copies of the approval to the applicant and giving to the construction occupations registrar a copy of the amended approval, a copy of the amended plans, and if notification of the certifier's appointment has not previously been given to the construction occupations registrar—notification of the appointment. The clause has a note about the use of approved forms and a note about determined fees. **Clause 34** makes a building approval for building work end if another building approval is issued after that previous building approval and both are for the same building work. It only applies where the previous building approval was in force when the subsequent approval was issued. It explains that it applies even if the other building approval relates to other building work not covered by the original approval.

Clause 35 prohibits the issue of a building approval for building work on a parcel of land from authorising either or both of 2 things described in the clause. One thing is use of the land for a purpose other than that for which the lease for the land was granted. It only applies to land leased from the Commonwealth. The other thing is the use of the land contrary to a provision, covenant or condition of any lease on the parcel.

Clause 36 describes how long the period of time is that a building approval operates. It provides that a building approval is valid until the end of the earliest of 2 periods it describes apply to the approval—1) the period of 3 years beginning on the day of its issue, or alternatively 2) the period that is the ***development period*** applies to the building work. The clause also has a note about how a building approval ends if a further approval is issued for the same building work, as provided for by clause **34** of the Bill. The clause also defines what is meant by the term ***development period*** for the clause—***development period*** means a period within which, under another law in force in the ACT or a condition of the relevant lease, the building work must be completed. The clause also entitles the certifier to extend the period of validity of the building approval in the following circumstance—if the development period applying to the building work is extended, the certifier may extend the period of operation of the building approval to a day that is no later than the day the extended development period ends. However it prohibits in any case the extension of the period of validity of a building

approval to a day that is more than 3 years after the day the approval was issued. An intention is that a building approval can never be valid for a period longer than a 3-year period commencing on the date of issuing the approval. That recognises the fact that standards for building design and construction change over time causing building approvals to fall behind current standards over time.

Building commencement notices

Clause 37 entitles a builder to apply to a certifier for a commencement notice in respect of building work or part of some building work. It explains that the builder must be the builder who is to do the building work, or part of it, and that the application must be in writing signed by the owner of the relevant land. The clause has a note that the ordinary rules of agency apply in relation to the application, and a note about the use of approved forms. It stipulates that if an application under the clause is for residential building work, then the application must be accompanied by at least 1 of 3 things—a residential building insurance policy in relation to the work or alternatively a certificate issued by an ***approved insurer*** stating that the insurer has insured the work under a residential building insurance policy or alternatively a fidelity certificate for the work issued by the trustees of a scheme approved under division 6.4 of the Bill (Approved fidelity fund schemes).

The clause requires the certifier to issue a building commencement notice for the building work, on receiving an application ***under*** the clause, if the certifier is satisfied on reasonable grounds that the builder's licence authorises the work in the building approval. The clause has a note explaining that the term ***under*** includes the term 'in accordance with' (see Legislation Act, dict, pt 1, def under), so an application must comply with the clause before it can be approved. It also has a note about the use of approved forms. The clause also requires the certifier to give a copy of a commencement notice to the construction occupations registrar within 1 week after issuing the notice, when a certifier issues a notice. The clause also indicates that the clause only applies where 3 circumstances all exist—1) a building approval has been issued for building work, 2) under the *Construction Occupations (Licensing) Bill 2003* any of the work must be done by a licensed builder, and 3) a licensed builder has been engaged to do the work.

The clause also defines what the term ***approved insurer*** means for the clause—an ***authorised insurer*** who has had a form of residential building insurance policy approved by the construction occupations registrar and has not given to the registrar a notice under clause **95** (Duties of insurers) of the Bill. The term ***authorised insurer*** is defined in the dictionary at the end of the Bill. The clause also refers to clause **84** of the Bill for a definition of the term ***residential building work***, for clause **27**.

The building commencement notice requirement is necessary to provide certainty about the statues of the matters covered by a notice.

Clause 38 causes a building commencement notice for building work to automatically end if, for residential building work—the work is no longer ***insured***.

The clause also causes a notice to automatically end if the building approval for the work ends. The clause defines what the term ***insured*** means for the clause—that the work is insured under a residential building insurance policy or that a fidelity certificate is in force for the work by the trustees of a scheme approved under division 6.4 of the Bill (Approved fidelity fund schemes). The clause is necessary to protect the public interest that lies in ensuring that relevant building work is only done where the public has the protection of the coverage referred to in the clause.

Clause 39 entitles the licensed builder mentioned in a building commencement notice to apply, in writing, for cancellation of the building commencement notice. If the builder does apply for its cancellation, it requires that builder to give to the owner of the parcel of the land where the work is being, or is to be, done—a copy of the application, and a notice that states that the owner has 2 weeks (the ***representation time***) to make representations to the construction occupations registrar about whether the building commencement notice to which the application relates should be cancelled. The clause has a note about the use of approved forms for the application. The clause requires the application to include an explanation of why the building commencement notice should be cancelled. The clause also provides that the clause only applies if a building commencement notice is in force for the relevant building work.

Clause 40 lists 2 circumstances both of which must exist for the clause to apply. The 1st is that the construction occupations registrar must have received an application under clause **39** of the Bill for the cancellation of a building commencement notice; and the 2nd is that either—the ***representation time*** for the application has ended or the owner of the land where the work is being, or is to be, done agrees in writing to the cancellation. The clause requires the construction occupations registrar to consider any representation made by the owner within the representation time if the ***representation time*** has ended without the owner of the land agreeing to the cancellation. The clause also entitles the registrar to cancel the building commencement notice if satisfied—that the builder mentioned in the notice cannot do the building work or that it is otherwise appropriate to cancel the notice.

Clause 41 clarifies that 2 or more building commencement notices for the same building work may be in force at the same time. The clause also explains that a building commencement notice continues to operate for building work even if the building work being done is only part of the building work for which the commencement notice was issued. That is intended to cater for a situation where, for example, a small part of the work is completed, and more of the work is to be done at a later stage. The notice continues to operate despite the initial work being completed and so can apply to the later stage work.

Doing building work

Clause 42 sets out the requirements that must be complied with when building work is carried out. It prohibits the carrying out of building work except where the work is carried out in accordance with all of those requirements. A requirement is that the materials used in the building work must comply with the standards under the building code for the materials in buildings of the kind being built or altered. Another is that the way the materials are used in the building work must comply with their acceptable use under the building code for buildings of the kind being built or altered.

An intention of those 2 requirements is that the use of materials that they refer to should not result in a situation where the building work produces a building, or part of a building, that does not comply with the relevant provisions of the building code, because of the material used or the way it was used. Another requirement is that the building work must be carried out in a proper and skilful way. That requirement has a note that considerations to be taken into account to decide when work is carried out in a proper and skilful way may be prescribed under the regulations. The clause allows the regulations to prescribe considerations to be taken into account to decide whether building work is carried out in a proper and skilful way. Another requirement of the clause is that building work for which an approved plan is required must be carried out in accordance with the approved plans. Another requirement is that the building work required to be done by a licensed builder must be carried out by, or under the supervision of, the builder mentioned in the building commencement notice. The final requirement lists 2 things, both of which the building licensee in charge of the building work must take—1) all the safety precautions stated in or with the application for the building approval, and 2) any other safety precaution that a certifier or building inspector may require the building licensee to take under clause **46** of the Bill.

The clause is necessary to promote good practice in doing building work so as it is consistent with reasonable public expectations of builders and to protect public confidence in the standards of that work.

The Bill requires various things, such as inspections, to happen at various times during the carrying out of building work. It breaks the process of doing building work into stages. **Clause 43** allows the regulations to prescribe what each ***stage*** of building work is. The clause also prohibits a building licensee in charge of building work that has reached a ***stage*** from proceeding with building work beyond the ***stage*** unless the 2 criteria it lists are both satisfied—1) the licensee has given to the certifier notice that the stage has been reached, and 2) the certifier has inspected the building work and given written permission for the work to proceed. The clause creates a strict liability offence against a person if the person fails to comply with the prohibition and proceeds past a ***stage***. The clause specifies a maximum penalty of 50 penalty units for the offence, the same amount for the corresponding regulatory offence in the *Building Act 1972*.

The clause also creates a further strict liability offence—the building licensee in charge of building work commits the offence where that person proceeds with any building work above dampcourse level when both of the criteria clause **43** of the Bill lists in relation to surveys has not been satisfied. The 1st of the 2 broad criteria is that the certifier has received either a plan signed by a registered surveyor stating the position of the building in relation to the boundaries of the parcel of land where the building is to be erected and stating the level that the floor or floors of the building will have in relation to a level stated in the approved plans or another document prescribed under the regulations. The 2nd criterion is that the certifier is satisfied that the position of the building and the level of the floor or floors are in accordance with both the approved plans and the conditions to which any consent or approval mentioned in clause **27** (1) (b) of the Bill is subject. The clause specifies a maximum penalty of 50 penalty units for the offence, the same amount for the corresponding regulatory offence in the *Building Act 1972*.

The clause requires also that a person give written test results as follows—if a building licensee in charge of building work is required under clause **44** (5) of the Bill to conduct a test, the licensee must, as soon as practicable after the test is completed, give the person who made the requirement the written results of the test.

Clause 44 sets out things that a certifier is require to do in relation to the stages of building work. It requires the certifier to inspect the building work as soon as practicable after the certifier receives the relevant notice under clause **43** (3) (a) of the Bill for the building work. The clause requires the certifier to give the building licensee in charge of the building work the written directions that are reasonable and appropriate for achieving compliance with Bill's clause **42** (Requirements for carrying out building work). The clause explains that is only required where if, after inspection, a certifier is satisfied on reasonable grounds that the building work does not comply with clause **42**. The clause stipulates that where those written directions are required to be given they must be given on the relevant inspection, or as soon as practicable (but in any case within 2 business days), after inspection.

However, if a certifier is satisfied, after an inspection, that building work complies with the Bill's clause **42** clause **44** requires the certifier to certify that the work complies with clause **42** of the Bill. The clause further requires the certifier in that case to give the certificate to the building licensee in charge of the building work. The clause stipulates that where that certificate is required to be given it must be given on the relevant inspection, or as soon as practicable (but in any case within 2 business days), after inspection.

Clause **44** also creates strict liability offences in respect of a certifier if the certifier contravenes clause **44** (1) or **44** (2) of the Bill. The clause specifies a maximum respective penalty of 10 penalty units for the offence, the same amount for the corresponding regulatory offence in the *Building Act 1972*.

Clause **44** also entitles a certifier to have testing done in order to assist in fulfilling the certifier's inspection function. The clause provides that a certifier may, by written notice, require the building licensee in charge of the building work to conduct, on the materials used or to be used in the work, on the structure of the building, or in relation to anything else connected with the work, the tests stated in the notice. However, the provision does not further limit when that entitlement may be exercised. It is intended that the certifier may exercise the entitlement at any time, whilst certifier for the work.

Clause 45 requires the building licensee in charge of building work to keep records of tests under clause **44**, and of other tests referred to in the clause—any records of test borings, test loadings or other investigations made to work out the permissible loadings on piles used in the building work, pile-driving operations, calculations of allowable loadings and details of the location of the piles, and any records of test loadings and excavations made to work out the bearing capacity of the foundation for the building or proposed building or building as proposed to be altered. The records mentioned are required by the clause to be kept until a certificate of occupancy for the building work is issued; and must be given to the certifier when the certificate of occupancy is issued.

Clause 46 entitles a building inspector or certifier to, in writing, give the building licensee in charge of building work directions about the safety precautions that the inspector or certifier believes on reasonable grounds are necessary to protect the safety of people using a street or place. It describes the 2 circumstances which must both exist for the clause to apply—firstly, building work for which a building approval has been issued is being carried out at or near to the street or place that is open to or used by the public. Secondly, the building inspector or certifier finds, on inspection, that inadequate safety precautions in relation to the building work are being taken to protect the safety of people using the street or place. The clause has 2 examples to illustrate those circumstances—1: George is building a swimming pool on his property, but the property is not yet fenced and is open to the street; and 2: building work is being done on an are of the ground floor of a building in Civic to which the public have access. The clause also has a note about the application of examples. The clause also clarifies that the directions on safety precautions may be given whether or not safety precautions were submitted to the certifier who issued the building approval, and if safety precautions were submitted—whether or not those precautions are being complied with.

Clause 47 entitles a certifier to require the owner of a parcel of land where building work is being, or has been, carried out to give the certifier the certificates by professional engineers about the structural sufficiency, soundness and stability of the building as erected or altered for the purposes for which the building is to be occupied or used. However, it limits the circumstances under which the certifier may exercise that entitlement—only if the certifier is satisfied on reasonable grounds that it is desirable to do so in the interests of people who occupy or use, or are likely to occupy or use, the building or part of the building that is being, or has been, erected or altered. It also clarifies that the certifier may exercise the

entitlement at any time before or after the completion of building work. However, it is intended that a person can only exercise that entitlement whilst they are the certifier appointed for the work.

Clause 48 sets out things required to be done when building work appears complete. It explains that it applies if building work appears to have been completed and the certifier is satisfied on reasonable grounds that—the work has been completed in accordance with the Bill and substantially in accordance with the approved plans, and the building or part of the building as erected or altered is structurally sufficient, sound and stable for the purposes for which it is to be occupied or used. The clause lists the things, all of which, within 7 days after the day the certifier is satisfied, the certifier must give to the construction occupations registrar. This list of things is as follows—

(a) if a consent or approval mentioned in clause **27** (1) (b) was required to be obtained—written evidence of the consent or approval;

(b) a copy of the (survey) plan mentioned in clause **43** (2) (a) (Stages of building work);

(c) a copy of each ("passed" inspection) certificate issued for the building work under clause **44** (2);

(d) if the regulations require that, on completion of the building work, the consent or approval of anyone is to be obtained—

written evidence of the obtaining of the consent or approval;

(e) a certificate by the certifier that the building work has been completed in accordance with this Bill and substantially in accordance with the approved plans;

(f) if a certificate has been obtained under clause **47** (Structural engineer's certificate)—the certificate;

(g) if no certificate under clause **47** has been obtained—a written statement to the effect that—

(i) the certifier is satisfied that the building or part of the building as erected or altered is structurally sufficient, sound and stable for the purposes for which it is to be occupied or used; and

(ii) no certificate under clause **47** is required;

(h) if, in the certifier's view, the requirements of a stated subclause of clause **69** (Certificate of occupancy) have been satisfied—written advice that the construction occupations registrar would be justified in issuing a certificate of occupancy for the building under the subclause;

(i) a copy of the following documents and papers relating to the building work:

(i) any application to the certifier under this Bill and any accompanying document;

(ii) all plans or drawings;

(iii) any approval, certificate, determination, notification or permission issued or given (a ***relevant document***);

(iv) any certificate or other document given or prepared by someone else that the certifier has relied on for the purpose of issuing or giving a ***relevant document***;

(v) the certifier's working papers and calculations that are relevant to the decision to issue, grant or give a document mentioned in subparagraph (iii).

The clause also entitles the construction occupations registrar to, in writing, exempt a certifier from complying, completely or partly, with any subparagraph of subclause **48** (2) (i) of the Bill in relation to building work stated in the exemption. It provides that a certifier is not required to give the construction occupations registrar a copy of a document or paper mentioned in subclause **48** (2) (i) of the Bill if the certifier has already given to the construction occupations registrar, under the Bill, the document or paper, or a copy of the document or paper or if the registrar has exempted the certifier under subclause **48** (3) from giving the copy.

The clause also stipulates that it applies in relation to a part of a building in the same way as it applies to a building.

Clause 49 requires a person to carry out building work only in a way that will, or is likely to, result in a building that complies with the building code (the Building Code of Australia). It creates a strict liability offence where a person fails to comply with that requirement. The clause specifies a maximum respective penalty of 50 penalty units for the offence, the same amount for the corresponding regulatory offence in the *Building Act 1972*. Nevertheless, the clause also provides that it is a defence to a prosecution for that offence if the person proves that—the building work was carried out in accordance with approved plans; and if the approved plans had been followed at the time of approval, the resulting building would have complied with the building code. An intention is that in those circumstances, where building work is being done, and a building code requirement in relation to doing that work changes, the work can continue to be done in accordance with the building approval and the code requirement before it changed. Otherwise a change in the code could see partly done building work having to be demolished and redone to comply with the change. Other provisions in the Bill relating to the life of building approvals ensure that such cases cannot fall more than 3 years behind the current building code requirements without needing a fresh building approval. The fresh approval will require the respective work to be done to the up-to-date provisions of the building code as in force on the day of the approval.

The clause also explains that building work is taken not to result in a building that complies with the building code if, for each provision of the building code with which the building must comply—the building will not comply with the deemed-to-satisfy provision of the building code and the approved plans for the building work do not state an alternative solution under the building code. An intention is to require all such work to either be done in accordance with the relevant deemed-to-satisfy provision of the building code or if an alternative solution under the building code is to be relied upon in doing the work, it must be stated in the approved plans. That is necessary to ensure that the plans serve as the single reference document that records how a building's design or construction departs from the deemed-to-satisfy provision of the building code. That is important as often such departures (alternative solutions) rely on the building having a particular kind of element. For example, a consideration of an alternative solution in respect of fire and smoke handling requirements may depend on a partly enclosed car park having an open grill access door to permit required ventilation. Replacing the door with a solid door could cause the car park to be more dangerous than would be the case if it had an open grill type of door. It is intended in that case the plans indicate that as part of an alternative solution the door must be an open grill type for ventilation. The requirement to specify such information in the plans was not a requirement in the *Building Act 1972*, but that Act requires such information to be provided in the application for the plan approval.

Clause 50 requires a certifier to, as soon as practicable, notify the construction occupations registrar of any contravention of the Bill that comes to the certifier's attention. It is intended that that requirement apply in relation to work that the certifier is appointed certifier for, as a person is not a certifier in respect of any other building work. The clause has a note that a reference to an Act includes a reference to the statutory instruments made or in force under the Act, including regulations and the building code (see Legislation Act, s 104). The clause also creates a strict liability offence against a certifier for a failure by the certifier to comply with the requirement. The clause specifies a maximum respective penalty of 5 penalty units for the offence, the same amount for the corresponding regulatory offence in the *Building Act 1972*.

The clause also provides a dispensation for certain building work. The notification provision does not apply to building work only because the work does not comply with clause **42** (Requirements for carrying on building work) of the Bill if the building licensee in charge of the building work fixes the matter to the satisfaction of the certifier within a reasonable time after the day the matter is brought to the licensee's notice. The clause also has an example to illustrate a circumstance where that dispensation does not apply: it comes to a certifier's attention that a builder proceeded with building work above the dampcourse level without a plan mentioned in clause **43** (2). That contravention of the Bill must be reported under clause **50** (1), and clause **50** (2) does not have an effect because the contravention relates to clause **43** (Stages of building work), not clause **42**. The clause also has 2 further notes. One note explains that the certifier has the

evidentiary burden of establishing the matters mentioned in subclause **50** (2) (see Criminal Code, s 58). An intention there is that a certifier who relies on the exemption from reporting unlawful work bears the evidentiary burden of establishing that the exemption applied to that work. The second note explains the application of examples.

The clause also clarifies that the requirement that a certifier notify under the clause applies even if a direction under clause **44** (2) (Stage inspections) has been given in relation to the matter that constitutes the contravention, but only if the defect is not dealt with in a reasonable time.

The clause is necessary as certifiers are privatised regulators providing the only building inspection and approval process under the Bill, and therefore it is beneficial that certifiers involve the registrar in cases of unlawful building work. The registrar has wider powers for dealing with such work than certifiers.

Clause 51 prohibits building work from being carried out other than in accordance with clause **42** (Requirements for carrying out building work). It creates a strict liability offence against a person if building work is begun or carried out on a parcel of land in contravention of that prohibition and the person is the owner of the parcel of land or is the person who carries out the building work. The clause specifies a maximum respective penalty of 50 penalty units for the offence, the same amount for the corresponding regulatory offence in the *Building Act 1972*.

The clause sets out several defences against prosecution under the clause. They relate to awareness of, or belief about, certain circumstances set out in the clause.

Part 4 Stop and demolition notices

Part 4 mainly provides entitlements to prohibit the carrying out of building work and entitlements to require certain building work to be carried out. The part's provisions are based on the corresponding provisions in the *Building Act 1972*, except that the Bill entitles building certifiers to issue stop work notices whereas the Act didn't. That is to assist certifiers in their privatised-regulator role.

Clause 52 defines what the term ***easement*** includes for part 4 of the Bill—***easement*** includes an area of land identified as an easement for electricity, telecommunication, water, drainage and sewerage services in, on or over the land on certificate of title or on a deposited plan under the *Districts Act 2002.*

Clause 53 entitles the construction occupations registrar, a building inspector or a certifier to, by written notice (a ***stop notice***), prohibit the carrying out of any further building work or of building work stated in the ***stop notice***. It sets out a list of circumstances and provides that it applies if any of the circumstances exist. The circumstances all relate to how building work is being, or is to be, carried out, and are as follows—

(a) without a building approval having been issued for the work; or

(b) otherwise than in accordance with the approved plans for the building work; or

(c) contrary to a provision of this Bill relating to the building work; or

(d) if the building work is being carried out on a parcel of land held under lease from the Commonwealth—contrary to a provision, covenant or condition of the lease; or

(e) for building work forming part of a development requiring approval under the Land Act, division 6.2—without the approval; or

(f) for building work forming part of a development approved under the Land Act, division 6.2—contrary to the approval, or a condition of the approval; or

(g) for building for an exempt building—so that the building, or part of the building, is or will be on an easement.

The term ***exempt building*** is defined in clause **12**. Clause **53** gives 2 examples of circumstances of carrying out building work to which the clause applies—

1: the footings of a building have been poured and are setting. The footings are on an easement. A ***stop notice*** can be issued for the building work, which is to continue with the work on top of the footings;

2: a concrete truck is about to deliver concrete to a building site for which there needs to be an approved plan, although there is no plan. A ***stop notice*** can be issued for the building work to be done.

It is intended in the case of example 1 that the ***stop notice*** can be issued regardless of the fact that it may not be known what building work may be erected upon the footings, or regardless of the fact that no evidence of intention to continue with work is at hand. The clause also has a note about the application of examples to the Bill.

The clause also lists circumstances that cause a ***stop notice*** to end. Those circumstances are—1) the person who gave the ***stop notice*** cancels it, or 2) the grounds for giving the ***stop notice*** no longer exist, or 3) the ***stop notice*** is cancelled under clause **55** (Application by land owner for cancellation of stop notice) or clause **57** (Decision on application by other than land owner). The clause has 7 examples of when the grounds for giving the ***stop notice*** no longer exist. They refer to various paragraphs within subclause **53** (1) of the Bill—

1 if the ground for issue of the notice was clause (1) (a)—an approval has been issued for the work;

2 if the ground for issue of the notice was clause (1) (b)—the building work that was not in accordance with the approval has been removed so that the remaining work complies with the existing building approval or a new approval has been obtained that allows the building work;

3 if the ground for issue of the notice was clause(1) (c)—if the grounds of the contravention were that the building work was being carried out by a person without a builder licence, an appropriately licensed builder continues the building work;

4 if the ground for issue of the notice was clause (1) (d)—the building work that was not in accordance with the lease is removed or the lease varied to allow the work;

5 if the ground for issue of the notice was clause (1) (e)—the missing approval is obtained;

6 if the ground for issue of the notice was clause (1) (f)—the building work that was not in accordance with the approval is removed or the approval varied to allow the work;

7 if the ground for issue of the notice was clause (1) (g)—the building work that was on the easement is removed or the easement is changed to allow the work.

The clause prohibits a ***stop notice*** being issued for work in relation to an ***exempt building*** without a building approval having been issued for the work or otherwise than in accordance with the approved plans for the building work. The term ***exempt building*** is defined in clause **12**.

The clause is necessary to prevent the escalation of risks associated with continuing with building work contrary to the respective requirements. Those risks include wastage of resources arising from potentially having to undo or redo unlawful building work, or the creation of structurally dangerous building elements.

Clause 54 limits the operation of a ***stop notice***. It explains that it only applies if a ***stop notice*** has been issued in relation to building work. It provides that a ***stop notice*** does not prevent building work being carried out in the particular circumstances it describes. The clause indicates the following circumstance must exist for that provision to apply—doing the work does not, or would not contravene the Bill. The clause further indicates that, additionally, at least one of the following circumstances must also exist for that provision to apply: the only purpose of the work (***rectification work***) is to fix or reverse the building work that caused the ***stop notice*** to be issued; or the work is necessary to ensure rectification work is carried out safely.

The clause also has 2 examples that illustrate how it applies—

1 a ***stop notice*** is issued in relation to an extension on a house, which does not comply with the building code. The extension may be pulled down, but the rest of the house may not;

2 a garage has been built partly on an easement. If it is decided to make the garage smaller so it is not on the easement, the building of temporary

supports necessary to support the roof and ensure the safety of the rest of the garage while the garage is made smaller is building work allowed to be done despite the ***stop notice***.

The clause has a note about the application of examples. Those examples assume that the ***rectification work*** they refer to is done in a way that does not, or would not contravene the Bill. It is intended that if the ***rectification work*** is carried out in a manner that is a ground for a ***stop notice*** under the Bill, then another ***stop notice*** is not prevented from being issued nor from having effect in respect of the ***rectification work***.

Clause 55 entitles the owner of a parcel of land to apply in writing to the construction occupations registrar for cancellation of a ***stop notice***, that relates to the owner's land, and entitles the registrar to have the discretion to decide to subsequently cancel that ***stop notice*** or not. The clause has a note that the ordinary rules of agency apply in relation to an application under it. That clarifies that the landowner may appoint an agent to act for the landowner and make the application on the landowner's behalf, and that in that case the application can be taken to have been made by the landowner. The clause explains that it applies if a ***stop notice*** has been given in relation to building work on a parcel of land, regardless of who gave the notice. The clause explains that the landowner is only entitled to make the application if the application gives reasons why the ***stop notice*** should be cancelled. It is intended that the construction occupations registrar decide each application unless the owner withdraws the application or the subject notice otherwise ends. The clause requires the construction occupations registrar to consider 3 things before the registrar makes a decision on an application—

- the application; and
- the reasons why the ***stop notice*** was given; and
- the current state of the building work to which the notice relates.

The clause also puts a further condition on when the registrar may cancel the notice—if the registrar is satisfied that the cancellation will not endanger the public or people who will use the building on which the building work is being, or is to be, done or affect public confidence about the standard of building work in the ACT. It is not intended that the clause effect any entitlement that the registrar has despite the application of that clause, to cancel a ***stop notice*** that the registrar issued.

Clause 56 entitles any person, except the owner of the relevant parcel of land, to apply in writing to the construction occupations registrar for cancellation of a ***stop notice***, giving reasons why the notice should be cancelled. It indicates that it applies if a ***stop notice*** has been given in relation to building work on a parcel of land, regardless of who gave the notice. On receiving an application, it requires the registrar to do 2 things—

- give the owner of the parcel of land a copy of the application; and
- tell the owner in writing that the owner may, within 2 weeks after the day the owner is given the copy of the application, either make written comments to the registrar on the merits of the application or tell the registrar in writing that the owner does not object to cancellation of the stop notice.

Clause 57 entitles the construction occupations registrar to cancel a ***stop notice*** if satisfied that the cancellation will not endanger the public or people who will use the building on which the building work is being, or is to be, done or affect public confidence about the standard of building work in the ACT. It indicates that it applies if the following 3 criteria are all satisfied—

- a person has made an application under clause **56** in relation to a ***stop notice***; and
- the construction occupations registrar has given the owner of the parcel of land to which the ***stop notice*** relates the a copy of the application and the information required under clause **56** (3) (b); and

either—

- the owner has told the registrar in writing that the owner does not object to cancellation of the stop notice; or the 2-week period for making written comments on the merits of the application has ended.

The clause requires the construction occupations registrar to consider 4 things before the registrar makes a decision on an application—

- the application; and
- the reasons why the ***stop notice*** was given; and
- any written comments from the owner given to the registrar within the 2 weeks mentioned in clause **56**; and
- the current state of the building work to which the notice relates.

It is not intended that clause **56** or **57** effect any entitlement that the registrar has despite the application of those clauses, to cancel a ***stop notice*** that the registrar issued.

Clause 58 entitles the construction occupations registrar to give a notice (a ***further notice***) that states the building work (including demolition) that is required to be carried out to ensure that the building work for which a building approval was issued will be carried out in accordance with the approved plans and the provisions of the Bill. It explains that the clause applies if a ***stop notice*** has been given on a ground other than a ground mentioned in clause **53** (1) (a) (which is about building work for which there is no approval). The clause requires the ***further notice*** to relate to the relevant ***stop notice***. The clause restricts the time

period in which the registrar may exercise that power to the period that is within 7 days after the day the ***stop notice*** is given. The clause also restricts the exercising of the power if the ground for the ***stop notice*** is mentioned in clause **53** (1) (f) (which is about building work that does not comply with an approval). In that case the registrar may only give a notice under clause **58** to carry out the demolition of a building if the planning and land authority recommends giving the notice. The clause provides that any building work done by a person to comply with a notice under clause **58** is taken not to contravene the respective ***stop notice***. It is not intended that that provision otherwise exempt the doing of an act or thing from the application of any law including the Bill. Clause **58** also provides that a ***further notice*** ends if the ground for the issue of the ***stop notice*** to which it relates no longer exists.

Clause 59 lists various ways that a ***stop notice*** or a ***further notice*** may be served. It specifies that they may be given to—

- the owner of the parcel of land where the building work mentioned in the notice is being, or is to be, carried out; or
- the person by whom the building work mentioned in the notice is being, or is to be, carried out; or
- for a ***stop notice***—on any person carrying out building work mentioned in the notice; or
- any 2 or more of the people, jointly, to whom the notice may be given under paragraph (a), (b) or (c).

The clause has a note—see clause 143 for service of notices.

It is not intended that the clause prevent a ***stop notice*** or further notice from being served in any other lawful manner.

Clause 60 entitles the construction occupations registrar to give the owner of the parcel of land where the building work was carried out, or the person by whom the building work was carried out, requiring the person to give to the registrar the plan mentioned in clause **43** (2) (a) of the Bill. That is a survey plan as described in that clause, signed by a registered surveyor. It is intended that the requirement operate regardless of the fact that the plan may not exist, and in that case the person cause the plan to be created and given to the registrar. The clause requires the notice to state the period within which the person must comply with the notice and for that period to be at least 7 days after the day the notice is given to the person. The clause explains that it applies if building work for which a building approval has been issued has been carried out in contravention of clause **43** (2) (Stages of building work). That clause refers to other requirements in relation to the above-mentioned plan.

The clause is necessary to ensure the location and height of floors in building work can be readily checked against the survey plan for compliance with the Bill's requirements.

The Bill entitles the construction occupations registrar to give a person a notice, in certain circumstances, requiring the person to carryout building work. **Clause 61** sets out a list of circumstances. It indicates that if such a circumstance exists, that is a precondition for the giving of a notice under clause **62** (Notice to carry out building work), which deals with notices requiring people to carryout building work. The circumstances listed are—

(a) building work has been carried out without a building approval required for the work;

(b) building work for which a building approval has been given has been carried out in contravention of clause **42** (Requirements for carrying out building work), or otherwise than in accordance with clause **43** (Stages of building work);

(c) building work, in relation to which a notice has been served under this part, has been carried out otherwise than in accordance with the notice;

(d) building work has been carried out on a parcel of land held under lease from the Commonwealth, contrary to a provision, covenant or condition of the lease;

(e) building work forming part of a development requiring approval under the Land Act, division 6.2 has been carried out without the approval;

(f) building work forming part of a development approved under the Land Act, division 6.2 has been carried out contrary to the approval, or a condition of the approval;

(g) building work in relation to an exempt building work has been carried out so that the building or part of the building is, or will, be on an easement;

(h) the construction occupations registrar finds, on inspection, that—

(i) for a building if plans or plans and specifications in relation to its erection or alteration have been approved under this Bill—the completed building has deteriorated, or is likely to deteriorate, so that the building is, or is likely to become, unfit for use as a building of the class stated, or for the purpose stated in the plans or plans and specifications approved for the most recent building work carried out in relation to the building; or

(ii) for a building other than a building of a kind mentioned in subparagraph (i)—the completed building has deteriorated, or is deteriorating, so that the building is, or is likely to be, unfit for any kind of use; or

(iii) building work has not been completed when the building approval for the building work ended; or

(iv) a building or part of a building is not structurally sound; or

(v) the maximum safe live load, or the load that a building was designed to carry, has been exceeded; or

(vi) injury to people or damage to property may result from a part of a building becoming detached because of the external condition of the building; or

(vii) a building or part of a building is unsafe because of fire hazard or unfit for use because of a danger to health.

Clause 62 establishes the construction occupations registrar's entitlement to require building work to be done. It provides that if a precondition under clause **61** exists in relation to building work on a parcel of land, the registrar may give the owner of the parcel a notice directing the owner to carry out stated building work (including demolition) on the parcel within a stated period, in the notice.

The clause further provides that the notice may also include a direction to the owner to submit plans for approval and obtain the issue of a building approval. The clause also explains that if building work has been carried out in the circumstances mentioned in clause **61** (a), a notice given by the registrar under subclause (1) is taken to have been revoked if a certifier, on application by or on behalf of the owner of the parcel of land made under this Bill within 2 weeks after the day the notice is given, issues a building approval for the building work. The above-mentioned clause **61** (a) relates to building work that has been carried out without a building approval required for the work. Clause **62** also limits the registrar's entitlement to require a person to do building work—it does not allow the registrar to require a person doing building work in relation to an ***exempt building*** to obtain an approval for the building work. The meaning of the term ***exempt building*** is defined in clause **12**.

Clause **62** also restricts the registrar's entitlement to require demolition on clause **61** (f) grounds (building work forming part of a development approved under the Land Act, division 6.2 has been carried out contrary to the approval, or a condition of the approval). The clause explains that if building work has been carried out in the circumstances mentioned in clause **61** (f), the registrar may only give a notice under clause **62** to carry out the demolition of a building if the planning and land authority recommends the demolition. The clause also provides that a notice given to the owner of a parcel of land by the registrar under subclause **62** (1) directing the person to carry out building work may state reasonable safety precautions to be taken in carrying out the building work. An intention is to expand the application of the notice so it is not limited to building work but so as it can include a requirement that the person do other activities that are reasonable safety precautions to be taken in carrying out the building work. It is not intended that a

notice that fails to state such precautions allow the person doing the building work to not take reasonable safety precautions.

Clause **62** also creates an additional requirement for certain persons—if the owner of a parcel of land does not hold a builder licence that authorises the doing of building work required to be done by a notice under this clause, and the building work is required to be done by a building licensee, the owner must appoint someone to do the work who has a builder licence that authorises the work.

Clause 63 requires that the owner of the parcel of land must give the construction occupations registrar the fees that would have been payable to the registrar if the owner had been required to submit plans for approval and that would have been payable to the registrar by the certifier for a building approval in relation to that building work. An intention is to ensure that the creation of the system for requiring noncompliant building work to be brought into compliance does not also amount to a method of avoiding the payment of fees that would have been payable had the building work been initially done in a complaint manner. The clause indicates that it only applies if the owner of a parcel of land is directed by a notice under clause **62** (1) to carry out building work (other than demolition) and the notice contains no requirements about the approval of plans or the obtaining of a building approval.

Clause 64 creates a strict liability offence against a person if the person is given a notice under part 4 of the Bill and the person contravenes the notice. The provision caters for a circumstance such as where for example the person required by a notice to do building work is denied access to the site of the work, and thereby is unable to fulfil the requirement. It provides that that it is a defence to a prosecution for an offence against subclause **64** (1) if the defendant establishes that the defendant paid a reasonable amount to have the work done by someone else who was licensed to do the work. It is intended that that defence can operate regardless of if or not the person given the money caused the required work to be done. The clause specifies that the maximum penalty for the offence is 50 penalty units, the same amount for the corresponding offence in the *Building Act 1972*.

Part 5 building occupancy

Part 5 of the Bill relates mainly to requirements in connection with the occupancy and use of buildings. The part's provisions are based on the corresponding provisions in the *Building Act 1972.*

Clause 65 explains that part 5 does not apply to building work in relation to an ***exempt building***. The meaning of the term ***exempt building*** is defined in clause **12**. Division 5.1 of the Bill mentions the term ***prescribed requirements*** and **clause 66** defines what the term ***prescribed requirements*** means in division 5.1 of the Bill—in relation to building work it means the requirements of the Bill or the requirements of the approved plans for the work. The clause has a note—a reference to an Act includes a reference to the statutory instruments made or in

force under the Act, including regulations and the building code (see Legislation Act, s 104).

Division 5.1 requires the construction occupations registrar, in certain circumstances, to work out whether building work has been completed in accordance with the ***prescribed requirements*** for that division. **Clause 67** provides that, in working out whether building work has been completed in accordance with the ***prescribed requirements***, the construction occupations registrar may have regard to certificates and other documents given to the registrar by the certifier under clause **48** of the Bill. That clause **48** relates to documents and things that the certifier is required to give the registrar, when that work appears complete, that relate to the building work. It is not intended that the registrar be required to have regard to any of those documents, but rather the registrar may have regard to anything that the registrar believes is relevant in working out whether building work has been completed in accordance with the ***prescribed requirements*** for Division 5.1

Division 5.1 also relates to the giving of certain certificates that mainly relate to the occupancy or use of buildings. **Clause 68** provides that the giving of a certificate under division 5.1 in relation to a building or part of a building does not affect the liability of anyone to comply with the provisions of a Territory law (including the Bill) relating to the building or part of the building.

Clause 69 requires the construction occupations registrar to issue certain various certificates in certain various circumstances mentioned in the clause. There are 3 broad circumstances—

1. If building work involving the erection or alteration of a building has been completed in accordance with the ***prescribed requirements*** for the building work, the construction occupations registrar must, on application by the owner of the parcel of land where the building work was carried out, issue a certificate that the building work has been completed in accordance with the requirements and that the building as erected or as altered is fit for occupation and use as a building of the class stated in the approved plans for the building work.

2. If building work involving the erection or alteration of a building as completed is not strictly in accordance with the ***prescribed requirements*** for the building work but is substantially in accordance with the requirements, the construction occupations registrar may, on application made by the owner of the parcel of land where the building work has been carried out, issue a certificate that the building as erected or as altered is fit for occupation and use as a building of the class stated in the approved plans for that building work.

3. If part of a building has been erected in accordance with the ***prescribed requirements*** so far as they relate to the part of the building, the construction occupations registrar may, on an application made by the owner of a parcel

of land where the building is being erected, issue a certificate that the part of the building is fit for occupation and use as a part of a building of the class stated in the approved plans in relation to the building work.

(Clause **73** sets out some other information that a certificate may have to specify). (For the meaning of ***prescribed requirements,*** see clause **66**). Clause **69** also mentions a method of obtaining certain evidence of how the ***prescribed requirements*** for the building work that relate to plumbing, sewerage and drainage have been complied with, and a method of obtaining certain evidence of how the ***prescribed requirements*** for the building work that relate to electrical wiring work have been complied with for the purposes of clause **69**—

- a certificate under the *Water and Sewerage Act 2000* that the plumbing, sewerage and drainage work carried out in building work complies with the prescribed requirements for the building work relating to plumbing, sewerage and drainage work is evidence of the fact; and
- a certificate signed by an inspector under the *Electricity Safety Act 1971* certifying that the electrical wiring work, as defined by the *Electricity Safety Act 1971*, carried out in the building work complies with the prescribed requirements for the building work relating to the electrical wiring work is evidence of the fact.

Clause **69** also has a note—a reference to an Act includes a reference to the statutory instruments made or in force under the Act, including regulations (see *Legislation Act*, s 104).

Clause 70 requires the construction occupations registrar to cancel a certificate of occupancy that relates to a part of a building if the clause applies. It explains that it applies if both of the following circumstances exist—

- a certificate of occupancy has been issued under clause **69** (3) for a part of the relevant building; and
- the construction occupations registrar, on completion of the whole of the building work, issues a certificate of occupancy for the whole of the building.

Clause 71 requires the construction occupations registrar to issue a certificate to the effect that building work was carried out in accordance with the ***prescribed requirements*** for the work, if the clause applies. (For the meaning of ***prescribed requirements,*** see clause **66**). It explains that it applies if both of the following circumstances exist—

- the relevant building work (involving the demolition of a building) has been completed in accordance with the ***prescribed requirements*** for the building work; and
- the owner of the parcel land where the building work was carried out made application to the construction occupations registrar for the certificate.

(Clause **73** sets out some other information that a certificate may have to specify).

Clause 72 requires the construction occupations registrar to issue a certificate to the effect that building work was carried out in accordance with the ***prescribed requirements*** for the work, if the clause applies. (For the meaning of ***prescribed requirements,*** see clause **66**). It explains that it applies if both of the following circumstances exist—

- the relevant building work (involving the erection of a structure on or attached to land or a building) has been completed in accordance with the ***prescribed requirements*** for the building work; and
- the owner of the parcel land where the building work was carried out made application to the construction occupations registrar for the certificate.

Clause 73 provides that if the construction occupations registrar issues a certificate for building work carried out by a person who holds an owner-builder licence, the certificate must include a statement to the effect that part 6 (Residential building—statutory warranties, insurance and fidelity certificates) may not apply in relation to the building work. It is not intended that the registrar need determine the status of the application of that insurance in that circumstance, but rather that the certificate contain the required statement to serve as a warning to the effect that the insurance may, or may not apply partially or wholly, as part 6 does not require such insurance or certificates in respect of work to be done under an owner-builder licence.

Clause 74 entitles an application to be made for a certificate that a building to which the clause applies is fit for occupation. It explains that only a person that is eligible under that clause can make such an application. The clause sets out the relevant eligibility criteria for that person—

- if when the application is made, the building is on land held under a lease from the Commonwealth, the application may be made by the lessee; or
- if, when the application is made, the building is not on land held under a lease from the Commonwealth, the application may be made—

(a) if the land is held by a person, including the Territory, under a tenancy from the Commonwealth, whether or not the occupier is the tenant or a subtenant by the Commonwealth or the tenant; or

(b) if the land is held under a tenancy from the Territory, whether or not the occupier is the tenant or a subtenant, by the tenant; or

(c) for national land—the Commonwealth; or

(d) for Territory land—the Territory.

The clause also sets out the things that an application under it must take account of. They are that the application must—

(a) be in writing signed by or on behalf of the applicant; and

(b) provide sufficient information to allow the building to be identified; and

(c) be accompanied by a copy of the plans and specifications relating to—

(i) the erection of the building and any alteration to it; or

(ii) the building when the application is made; and

(d) state the purpose for which the building or each part of the building is being used; and

(e) if it is intended that any part of the building be used for a purpose other than the purpose for which it is being used when the application is made—state the intended purpose.

Clause **74** also has a note that a fee may be determined under clause **149** for clause **74**. The clause also lists the circumstances that must exist for the clause to apply to a building—a certificate of occupancy or regularisation must not have been issued for the building and the building must have been erected on land that, when the building was erected, was held: by the Commonwealth, or by the Territory, or by someone else under a lease from the Commonwealth.

Clause 75 sets out what the construction occupations registrar is required to do if the registrar receives an application for a certificate under clause **74**. It requires the registrar, on receiving an application under clause **74**, and is satisfied that the building complies with subclause **75** (2)—issue a certificate (***certificate of regularisation***) that the building is fit for occupation if each part of it is used only for the purpose stated in the certificate; or in any other case to refuse the application. The clause also sets out criteria for a building to comply with in order for the building to comply with subclause **75** (2)—

(a) if it is structurally sound and can withstand the loadings likely to arise from its expected use; and

(b) contains reasonable provision for—

(i) the safety of people likely to be in the building if there is a fire, including the provision of adequate facilities for leaving the building; and

(ii) the prevention and suppression of fire; and

(iii) the prevention of the spread of fire.

Clause **75** also describes some things that the register is entitled to do to decide whether a building complies with subclause **75** (2)—the construction occupations construction occupations registrar may require the applicant for the certificate to provide the registrar with a written statement by a ***qualified licensed construction practitioner*** that deals with the matters mentioned in subclause

75 (2) (a) and (b), or such of the matters as the registrar states, and the registrar may consider that statement. It is not intended that the registrar be required to obtain, nor consider, such a statement in deciding whether a building complies with subclause **75** (2). Clause **75** defines what the term ***qualified licensed construction practitioner*** means for that clause—***qualified licensed construction practitioner*** means a person who—is licensed under the *Construction Occupations (Licensing) Bill 2003*; and in the construction occupations registrar's opinion, has sufficient expertise to provide a statement under subclause **75** (3) that would help the registrar to decide whether the building complies with subclause **75** (2).

Clause **75** also indicates what the construction occupations registrar is required to do if the registrar grants an application under it—if the construction occupations registrar grants the application, the registrar must issue to the applicant a certificate that the building is fit for occupation if each part of the building is used only for the purpose stated in the certificate.

Clause 76 creates a strict liability offence against a person if the person occupies or uses, or allows someone else to occupy or use, a building or part of a building, and the construction occupations registrar has not issued a certificate of occupancy for the building or part of the building. It is not intended that such occupation or use include occupation or use of the building for the purposes of building, demolishing or inspecting the building under the Bill, or for purposes incidental to those purposes. The clause specifies that the maximum penalty for the offence is 50 penalty units, the same amount for the corresponding regulatory offence in the *Building Act 1972*.

For the same reasons, the clause creates a strict liability offence against a person if all of the following 3 circumstances exist—

(a) the construction occupations registrar has issued a certificate of occupancy for only a part of a building (the approved part); and

(b) the person occupies or uses, or allows someone else to occupy or use, a part of the building for which no certificate of occupancy has been issued; and

(c) the purpose of the use is not incidental to the use of the approved part.

It is not intended that such occupation or use include occupation or use of the part of the building for the purposes of building, demolishing or inspecting the part under the Bill, or for purposes incidental to those purposes. The clause specifies that the maximum penalty for the offence is 50 penalty units, the same amount for the corresponding regulatory offence in the *Building Act 1972*.

The clause also explains that the use of the term ***building*** in the clause does not include a building for which a ***certificate of regularisation*** has been issued.

Clause 77 creates a strict liability offence against a person if the person—

(a) occupies or uses, or allows someone else to occupy or use, a building or part of a building—

(i) for a building in relation to the erection or alteration of which plans have been approved under this Bill—as a building or part of a building of a class other than the class stated in the plans approved in relation to the most recent building work that has been carried out in relation to the building; or

(ii) for a building in relation to the erection or alteration of which plans have been approved only under the repealed laws—for a purpose other than that stated in the plans and specifications approved in relation to the most recent building work that has been carried out in relation to the building; and

(b) the construction occupations registrar has not given written approval for the occupation and use.

The clause specifies that the maximum penalty for the offence is 50 penalty units, the same amount for the corresponding regulatory offence in the *Building Act 1972*.

Subclause **77** (3) requires the construction occupations registrar to, on written application, give his or her written approval for the occupation and use of a building or part of a building as a building or a part of a building of a class stated in the application if the registrar is satisfied that a reasonable certifier would, under this Bill, approve the plans for the erection of the building or part if—

(a) the building or part had not been erected and the certifier were then and there considering the plans; and

(b) the plans required the building or part to be of the same class as that stated in the application.

An example of the intention of that provision is to allow in that circumstance a person to apply for approval to use a building as a class of building that is different to the class stated in the certificate of occupancy for the building. Clause **77** also clarifies that if a parcel of land is held under a lease from the Commonwealth, an approval given by the construction occupations registrar under subclause **77** (3) in relation to the parcel of land does not authorise the use of the parcel for a purpose other than the purpose for which the lease was granted nor for the use of the parcel of land contrary to a provision, covenant or condition of the lease. Clause **77** also explains that the use of the term ***building*** in the clause does not include a building for which a ***certificate of regularisation*** has been issued.

Clause 78 creates a strict liability offence against a person if the person occupies or uses, or allows anyone else to occupy or use, a building to which it applies, or a

part of the building, for a purpose other than the purpose stated in the certificate of regularisation. It explains that it applies to a building for which a ***certificate of regularisation*** has been issued that is on land held under a lease or tenancy from the Commonwealth by a person other than the Territory or is on land held under a sublease or tenancy from the Territory. The clause specifies that the maximum penalty for the offence is 50 penalty units, the same amount for the corresponding regulatory offence in the *Building Act 1972*.

Clause 79 creates a strict liability offence against a person if the person fails to comply with the requirements of a notice given to the person under the clause. It explains that a person to whom a notice under subclause **79** (3) is given must not fail to comply with the notice and that a person who contravenes that provision commits the offence, in relation to each day the person contravenes the subclause (including any day when the person is convicted of an offence). The clause also lists the circumstances that must exist for it to apply—if, after being convicted for an offence against a building occupancy offence section, a person continues to use or continues to allow someone else to use a building or a part of a building in contravention of the section for an offence against which the person has been convicted.

The clause defines what the term ***building occupancy offence section*** means for the clause—any of the following clauses of the Bill:

- clause 76 (Occupation and use of buildings);

- clause 77 (Use of restricted buildings);

- clause 78 (Occupation and use of ex-government buildings).

Subclause **79** (3) entitles the construction occupations registrar to, by written notice to the occupier or to the person allowing the occupation (or both)—

(a) for a conviction for an offence against section 76—require the building to be vacated within the period stated in the notice; or

(b) for a conviction for an offence against section 77 or 78—require the occupation or use of the building or the part of the building in contravention of that section to stop within the period stated in the notice.

The clause specifies that the maximum penalty for the offence is 50 penalty units, the same amount for the corresponding regulatory offence in the *Building Act 1972*.

Clause 80 requires a copy of each certificate issued under part 5 of the Bill to be kept in the construction occupations registrar's office and entitles anyone to inspect a certificate at the registrar's office during the hours the office is open for business. The clause also mentions that if the registrar issues a certificate under clause **69** (1) or (3) (Certificates of occupancy) for a building or part of a building and a copy of a certificate of occupancy for the building or part of a building is

already being kept in the registrar's office, the registrar must replace the earlier certificate with a copy of the later certificate. It is not intended that the registrar be prevented from separately keeping an archive of earlier copies of such certificates. But it is intended that the copy that is usually available is to be the latest copy kept by the registrar.

Safe floor loading

Clause 81 creates 4 strict liability offences in relation to floor loadings of buildings. They apply in relation to class 5, class 6, class 7, class 8 or class 9 buildings, as classified by the Building Code of Australia. Those classes relate to non-residential use buildings, (the descriptions of classes in that code give greater detail about classes and respective uses). The maximum penalty for each offence under the clause is 5 penalty units, the same amount for the corresponding regulatory offence in the *Building Act 1972*. The 4 offences for the clause are set out below.

1. Subclause (1) creates an offence against a building owner if that owner contravenes that subsection, which provides—if a certificate is issued under this part on the completion of a class 5, class 6, class 7, class 8 or class 9 building or on the completion of the alteration of such a building, the owner of the building must attach, in a conspicuous place on the walls of each storey of the building, in way approved in writing by the construction occupations registrar, the number of metal plates of a size and form approved in writing by the registrar showing the maximum live load for which the floor on that storey has been designed.

2. Subclause (3) creates an offence against a building owner as follows—the owner of a building commits an offence if—

   (a) the building is altered; and

   (b) a later certificate is issued under part 5 of the Bill for the altered building; and

   (c) when the certificate is issued, the safe live load for a floor of that building is different from that shown for that floor on the metal plates attached to the walls of the floor under subsection (1); and

   (d) the owner does not substitute other plates showing the current maximum safe live load for the floor.

3. Subclause (4) creates an offence a building owner if the owner fails to maintain each plate under the clause.

4. Subclause (5) creates an offence against a person if the person occupies a building or part of a building in relation to which plates are required to be attached or substituted under this clause before they have been so attached or substituted. It is not intended that the provision apply in respect of

occupation of a building for the purposes of, or incidental to, building, demolishing or inspecting the building under the Bill or attaching, substituting or maintaining the plates under the Bill.

The clause stipulates that an approval of a plate's attachment and size and form by the construction occupation's registrar is a notifiable instrument.

Clause 82 creates a strict liability offence against a person if the person is the owner or occupier of a building which has a safe live load plate mentioned in clause **81** showing a maximum live load for a floor and each person fails to ensure that the maximum live load shown on the metal plate is not exceeded on that floor. The maximum penalty for the offence is 50 penalty units, the same amount for the corresponding regulatory offence in the *Building Act 1972*. The clause is needed to ensure buildings are not structurally overloaded.

Part 6 Residential buildings—statutory warranties, insurance and fidelity certificates.

Part 6 mainly creates a warranty that applies in certain circumstances, and a requirement to have certain insurance or a certain kind of certificate that relates to the risk of loss associated with breach of the warranty. The part's provisions are based on the corresponding provisions in the *Building Act 1972.*

Warranty for residential building work

Clause 83 indicates that part 6 does not apply to building work in relation to an ***exempt building***; or building work exempted under the regulations. (Clause **12** defines the meaning of the term ***exempt building***). The benefits gained from applying part 6 requirements to exempt buildings does not justify the consequential cost and effort of enforcing that application due to the fact that exempt buildings are generally minor buildings and structures of low or moderate cost.

Clause 84 defines or clarifies the meaning of certain terms used in part 6 of the Bill. In particular it defines the term ***residential building*** as meaning—

a building intended mainly for private residential use, or a part of such a building, if—

(a) the building has no more than 3 storeys at any point, excluding any storey used exclusively for parking; or

(b) for a part of a building—the part provides structural support, or is a structurally integral adjunct, to the building.

An intention is to balance the public benefit stemming from requiring warranty coverage, with the reluctance of the insurance industry to provide warranty insurance cover to high-rise buildings. Warranty insurance or fidelity fund certificates are required under Part 6 of the Bill.

The clause provides several examples to illustrate how the term ***residential building*** can be applied in various different contexts, and a note about the use of examples—

Examples

1 A building has shops on its ground storey, a hotel on its 2nd storey and private residential units on its 3rd storey. It is not a residential building because it is not used mainly for private residential use.

2 A building has 2 wings, which are structurally independent of each other. The north wing has 3 storeys including the ground storey. The south wing has 6 storeys including the ground storey. All storeys contain residential units. The north wing is a residential building. The south wing is not a residential building because it is 6 storeys.

3 A building has 2 wings that are dependent on each other for structural support. The north wing has 3 storeys including the ground storey. All storeys contain residential units. The lower 3 storeys of the south wing are structurally integrated with the north wing. A structural instability in any of the lower 3 storeys in the south wing could compromise the structural integrity of both wings of the building. The south wing storeys that are higher than the north wing are structurally independent of the north wing. The north wing of the building is a residential building. The lower 3 storeys of the south wing are a residential building to the extent that they are a structurally integral adjunct to the building as a whole. The upper 3 storeys of the south wing are not a residential building because they are over 3 storeys and not a structurally integral adjunct to the building.

4 A 4-storey residence has a parking garage as its ground storey. A structural instability in the garage could compromise the building's structural integrity. The garage is a residential building because it is a structurally integral adjunct to the building and the building is a residential building.

5 A single storey residence has a garage attached at the side. The roof trusses of the building span across the residence and garage in a single span. A structural instability in the garage could compromise the structural integrity of the roof trusses and, because of that, compromise the structural integrity of the building. The garage is a residential building because it is a structurally integral adjunct to the building and the building is a residential building.

6 A single storey residence has a garage attached at the side and under the same roofline as the residence. The garage is mainly used for cars and is not for residential use. No structural elements of the residence depend on the garage for structural integrity. A structural instability in the garage could not compromise the structural integrity of the residence. The garage is not a residential building because it is not a structurally integral adjunct to a building

intended primarily for residential use. The residence, apart from the garage, is a residential building.

Note—an example is part of the Bill, is not exhaustive and may extend, but does not limit, the meaning of the provision in which it appears (see Legislation Act, s 126 and s 132).

Clause 85 defines the meaning of the term ***completion day*** for residential building work, for part 6 of the Bill—it means the day the work is completed or the day the contract relating to the work ends, whichever is the later. The clause also explains that, without limiting that meaning, the work is taken to have been completed no later than the day a certificate of occupancy (if any) is issued for the work. Those certificates are provided under part 5 of the Bill.

That statutory warranty created by part 6 of the Bill applies in relation to certain building work of a certain cost. It is not efficient to require warranty insurance for building work less than that cost, and the insurance industry is reluctant to provide warranty insurance for building work greater than that cost. **Clause 86** explains what, for part 6, the ***cost of building work*** is—

(a) if a contract has been entered into for carrying out of the building work—the cost of the work as fixed by the contract (including the cost of any engineering service in relation to the land where the building work is to be carried out, but excluding the cost of the land where the building work is to be carried out); or

(b) in any other case—

(i) an amount agreed between the construction occupations registrar and the builder; or

(ii) if an amount is not agreed—an amount worked out by the registrar.

Clause 87 lists the kinds of things that part 6 of the Bill does not apply to in relation to ***residential building work***. (For the meaning of the term ***residential building work*** see clause **84**). The clause indicates that part 6 does not apply where ***residential building work*** is—

(a) carried out or to be carried out by or for the Territory or the Commonwealth, a Territory authority or an authority established under a Commonwealth Act; or

(b) in relation to which an owner-builder licence has been granted; or

(c) if the cost of the work is less than the amount prescribed under the regulations; or

(d) in relation to a building or dwelling other than a class 1 or class 2 building (which are essentially residential buildings under the Building Code of Australia).

However, the above-mentioned provision of the clause does not prevent part 6 of the Bill from applying in relation to ***residential building work*** carried out in relation to a garage that provides structural support for, or constitutes a structurally integral adjunct to, a class 1 or class 2 building. (See the Building Code of Australia for a description of those classes of building; they are certain kinds of dwellings). It is intended that a test to determine if a garage does not provide structural support for, or is a structurally integral adjunct to, a building is if the entire garage can be removed without adversely affecting any other structural member of the remaining building.

Clause 88 creates a ***statutory warranty***. Its force is to affect every contract for the sale of a residential building, and every contract to carry out residential building work to which a builder is a party, so that the contract is taken to contain a warranty under the clause. An intention is that regardless as to whether or not such contracts provide such a warranty, the effect of the clause is to place that ***statutory warranty*** into all such contracts. The clause spells out the particulars of the ***statutory warranty*** as set out below.

The builder warrants the following:

(a) that the **residential building work** has been or will be carried out in accordance with the Bill;

(b) that the work has been or will be carried out in a proper and skilful way and in accordance with the plans approved for the work by the construction occupations registrar;

(c) that good and proper materials for the work have been or will be used in carrying out the work;

(d) if the work has not been completed, and the contract does not state a date by which, or a period within which, the work is to be completed—that the work will be carried out with reasonable promptness;

(e) if the owner of the land where the work is being or is to be carried out is not the builder, and the owner expressly makes known to the builder, or an employee or agent of the builder, the particular purpose for which the work is required, or the result that the owner desires to be achieved by the work, so as to show that the owner is relying on the builder's skill and judgment—that the work and any material used in carrying out the work is or will be reasonably fit for the purpose or of such a nature and quality that they might reasonably be expected to achieve the result.

The clause also explains that each of the owner's successors in title succeeds to the rights of the ***owner*** in relation to the statutory warranties. It is intended that transferring title in the land where the building exists or is to be done will not cause the warranty to be void and the new title-owner will be entitled to the benefit of the warranties. The clause also explains that the warranties end at the end of the

period prescribed under the regulations after the ***completion day*** for the work (Clause **85** defines the meaning of the term ***completion day***). Clause **88** also clarifies what the term ***owner*** means in the clause—

(a) for a contract mentioned in subclause (1) for the sale of a residential building—the person to whom title in the land where the building was built is transferred under the contract; or

(b) for a contract mentioned in subclause (1) to carry out residential building work—the owner of the land where the work is to be carried out under the contract.

Clause 89 clarifies that the Bill does not limit the liability a builder would have to anyone apart from the Bill.

Coverage against breach of building warranty

Clause 90 lists criteria for ***compliant residential building work insurance***. The criteria covers—

- the **kind of insurer** that issues the insurance—for compliance it must be an ***authorised insurer***, (see the dictionary at the end of the Bill for the meaning of ***authorised insurer***)

- the **amount of coverage** (for compliance it must provide for a total amount of insurance cover of at least the amount prescribed under the regulations, or the cost of the work, whichever is less, for each dwelling that forms part of the work);

- **who it insures** (if the builder is not the owner of the land where the work is to be carried out—for compliance it must insure the owner and the owner's successors in title for the period beginning on the day the certifier in relation to the for the work issues a building commencement notice under section 37 for to the work and ending at the end of the period prescribed under the regulations after the day a certificate of occupancy is issued for the work. If the builder is the owner of the land where the work is to be carried out—for compliance it must insure the builder's successors in title for the period beginning on the day the title in the land is transferred to someone else and ending at the end of the period prescribed under the regulations after the day a certificate of occupancy is issued for the work. (See part 5 of the Bill for certificates of occupancy));

- **how much** of the premium is paid (for compliance the whole of the premium payable for the period of the insurance must have been paid);

- **what risks** the insurance covers (for compliance it must insure the owner (if the builder is not the owner) and the owner's successors in title against the risk of being unable to enforce or recover under the contract under which the work has been, is being or is to be carried out because of the insolvency,

disappearance or death of the builder. It must also insure the owner (if the builder is not the owner) and the owner's successors in title against the risk of loss resulting from a breach of a ***statutory warranty***. It must also insure the owner (if the owner is not the builder) and the owner's successors in title against the risk of loss resulting, because of the builder's negligence, from subsidence of the land. (Clause **88** gives particulars of the ***statutory warranty***));

- the period **claims** may be made within (for compliance it must provide that a claim under it may only be made within the period prescribed under the regulations, or a longer stated period after the claimant becomes aware of the existence of grounds for the claim);

- the **form of the policy** (for compliance the form of the policy must have been approved in writing by the construction occupations registrar).

However, subclause (2) stipulates that if the owner is a ***developer***, the insurance is taken to comply with subclause (1) (c), (f), (g) or (h) if it insures the owner's successors in title, even though it does not insure the owner. Those subclauses infer that the required insurance must cover the owner but an intention of subclause (2) is to not require a developer that is a landowner to provide insurance covering the developer as part of the required insurance.

The clause also explains that to remove any doubt, an insurance policy issued in relation to residential building work may exclude claims other than those in circumstances in which the builder is insolvent, dead or has disappeared. They are the only respective circumstances that the insurance is required to cover.

The clause also defines for the clause the meaning of the term ***developer***, for residential building work—it means a person for whom the work is done in a building or residential development where 4 or more of the existing or proposed dwellings are or will be owned by the person.

It is necessary to stipulate the criteria for compliant residential building work insurance for 2 main reasons: to set minimum benefit levels for the insurance coverage (a consumer protection); and to set its maximum benefit levels (to limit insurers' liabilities and thereby encourage the insurance industry to provide the insurance product).

Clause 91 stipulates how certain things operate in relation to compliant residential building work insurance—

- a complying residential building insurance policy may provide that the authorised insurer who issues the policy is not liable for the amount prescribed under the regulations, or the stated lesser amount, of each claim;

- in calculating the amount of the premium payable in relation to a ***complying residential building insurance policy***, the value of the work is taken to be equal to the cost of the work;

- a provision, stipulation, covenant or agreement that negatives, limits or modifies or purports to negative, limit or modify the operation of part 6 of the Bill is void;

- a ***complying residential building insurance policy*** is not be taken to be invalid only because it contains a term, condition or warranty not contained in the form of policy approved by the construction occupations registrar; but such a term if so unapproved is void. An intention is that in addition to the form of the policy approved by the registrar the policy may contain other terms, conditions or warranties, but the affect of the clause is to make those extra things void.

Clause 92 prohibits an authorised insurer from avoiding liability under a ***complying residential building insurance*** policy only because the policy was obtained by misrepresentation or nondisclosure by the relevant builder.

Clause 93 places certain limitations on what an owner can recover from an insurer under a ***complying residential building insurance*** policy. It explains that the owner is not entitled to recover from the insurer any amount by which the amount paid exceeds the cost of the work done. However, if the owner has paid a ***deposit*** on the work and the cost of any work done is less than the amount of the ***deposit***, the owner may recover from the insurer the lesser of the following amounts: (a) the amount equal to the amount of the ***deposit*** less the cost of any work done, or (b) the amount prescribed under the regulations less the cost of any work done. The clause also describes the circumstances that must exist for it to apply. It applies if all 4 of the following apply—1) the builder is not the owner of the land where the builder is carrying out residential building work; 2) the builder fails to complete the work because the builder becomes ***insolvent***; 3) the owner has paid the builder part or all of the cost of the work; and 4) the work is insured under a ***complying residential building insurance policy.***

The clause also describes the circumstances that must exist for a builder to be taken as being ***insolvent*** for the purposes of the clause—if the builder becomes bankrupt, applies to take the benefit of any law for the relief of bankrupt or insolvent debtors, compounds with his or her creditors or makes an assignment of his or her remuneration for their benefit. The clause also defines what is meant in the clause by the term ***deposit***—in relation to residential building work, ***deposit*** means an amount that was paid or payable by the owner to the builder, under the contract to carry out the work, before the beginning of the work.

Clause 94 entitles a judgment creditor to apply to a court for a direction that judgment be entered in favour of the creditor against the ***authorised insurer*** who issued the policy. It requires the judgement creditor to give the insurer at least 7

days written notice of his or her intention to make an application. The clause entitles an ***authorised insurer*** to, in addition to any other right or remedy, recover from a builder in relation to whose work a ***complying residential building insurance*** policy was issued so much of the following as the insurer has paid under, or because of, the policy:

(a) any judgment entered or obtained against the insurer; and

(b) any amounts paid by the insurer in payment, settlement or compromise of a claim or judgment against the builder or of a judgment entered or obtained against the insurer; and

(c) the costs of, and expenses reasonably incurred by, the insurer.

The clause explains that a judgment entered against an authorised insurer is enforceable only to the extent that it had not been satisfied at the time the judgment was entered. The clause also describes 3 circumstances, all of which must exist for the clause to apply. It applies if—

(a) a court gives judgment in favour of a person in relation to a matter for which the person is insured under a ***complying residential building insurance*** policy; and

(b) the insurer is a party to the proceeding in which the judgment is given; and

(c) the judgment is not satisfied in full within 30 days after the day judgment is entered.

The provisions of the clause are necessary to provide certainty to the insurance industry about the matters the clause deals with.

Clause 95 creates various offences against certain entities in relation to—

a strict liability offence against an insurer for failure to notify ceasing to be an authorised insurer, for which the maximum penalty is 50 penalty units, the same amount as for a corresponding regulatory offence in the *Building Act 1972*;

an offence against an authorised insurer for making certain misrepresenting about a policy, for which the maximum penalty is 250 penalty units, the same amount as for a corresponding offence in the *Building Act 1972*;

a strict liability offence against an authorised insurer for failing to report certain listed things to the construction occupations registrar in a certain time period, for which the maximum penalty is 100 penalty units, the same amount as for a corresponding offence in the *Building Act 1972.*

Fidelity fund schemes

Certain fidelity certificates issued by a fidelity fund scheme provide benefits to people having building work done, in much the same way as residential building

work insurance does. The certificate scheme is however technically not an insurance scheme.

Clause 96 entitles the trustees of a fidelity fund scheme to apply to the planning and land authority for approval of the fidelity fund scheme and for the authority to approve of the scheme in writing. It limits that approval entitlement to circumstances where the scheme complies with the relevant ***approval criteria***, which are set out at clause **99**. The clause requires an application to be signed by all of the scheme's trustees. The clause explains that the approval is a notifiable instrument. For expediency in establishing a scheme the approval is not intended to be a disallowable instrument. The clause has a note that a notifiable instrument must be notified under the *Legislation Act 2001*.

Clause 97 entitles the planning and land authority to require, by written notice, the trustees of a fidelity fund scheme to give the authority information, documents and a statutory declaration in relation to an application for scheme approval. It entitles the authority to not consider the application further until the trustees comply with the requirement of the notice. The clause explains that it only applies if the trustees of a fidelity fund scheme apply to the planning and land authority for approval of the scheme.

Clause 98 entitles the planning and land authority to require changes to be made to a fidelity fund scheme to ensure that it complies with the Bill, before it approves the scheme. The clause has a note—a reference to an Act includes a reference to the statutory instruments made or in force under the Act, including regulations and disallowable instruments (see Legislation Act, s 104).

Clause 99 entitles the Minister to determine in writing the requirements (the ***approval criteria***) for the Bill with which a fidelity fund scheme must comply as 1 prerequisite to being an approved scheme under the Bill. It requires the ***approval criteria*** to include requirements in relation to all of the things it lists. The clause explains that the approval criteria is entitled to apply, adopt or incorporate a law or instrument, or a provision of a law or instrument, as in force from time to time. The clause has notes—the text of an applied, adopted or incorporated law or instrument, whether applied as in force from time to time or as at a particular time, is taken to be a notifiable instrument if the operation of the Legislation Act, s 47 (5) or (6) is not disapplied (see s 47 (7)). A notifiable instrument must be notified under the Legislation Act. The clause also stipulates that a determination under it is a disallowable instrument and has a note—a disallowable instrument must be notified, and presented to the Legislative Assembly, under the Legislation Act.

Clause 100 creates a strict liability offence in respect of each of the trustees of a clause **96** approved scheme if the trustees fail to ensure that the scheme complies with the conditions of the scheme's approval. The clause specifies a maximum respective penalty of 60 penalty units for the offence, the same amount for the corresponding offence in the *Building Act 1972*. It also entitles the approval of a fidelity fund scheme to be given subject to conditions, and for such a condition to

be expressed to have effect despite anything in the Bill's ***prudential standards***. The ***prudential standards*** are determined under clause **103** of the Bill.

Clause 101 entitles the trustees of a clause **96** approved scheme to apply in writing to the planning and land authority for the authority's approval for a change to the scheme. It explains that it does not apply to a change to the scheme declared under the ***prudential standards*** to be a change to which it does not apply. The ***prudential standards*** are provided at clause **103** of the Bill. The clause also requires an application under it to be signed by all the trustees of the scheme and to set out the proposed change to the scheme and the reasons for the change.

Clause 102 entitles the planning and land authority to, in writing, approve or refuse to approve a change to a fidelity fund scheme approved under the Bill. However, it requires the planning and land authority to refuse to approve a change to a scheme if the authority is not satisfied that the scheme as proposed to be changed would continue to meet the ***approval criteria*** and the ***prudential standards***. The ***approval criteria*** are determined under clause **99** of the Bill. The ***prudential standards*** are provided at clause **103** of the Bill. The clause explains that an approval or refusal under it is a notifiable instrument. The clause has a note—a notifiable instrument must be notified under the Legislation Act.

Clause 103 entitles the Minister to, in writing, determine standards (the ***prudential standards***) for this Bill relating to ***prudential matters*** that must be complied with by a clause **96** approved fidelity fund scheme. It has a note—power given under a Bill to make a statutory instrument includes power to make different provision for different categories, eg different kinds of schemes (see Legislation Act, s 48). The clause also lists things that the prudential standards are entitled to do—

- require approval of the trustees of the approved scheme; and
- make provision in relation to—
  - (i) the capital adequacy of the scheme; and
  - (ii) the valuation of liabilities; and
  - (iii) the effectiveness of risk management strategies and techniques; and
  - (iv) requiring the giving of information to the commissioner for fair trading, or any other entity prescribed under the prudential standards, about decisions by the trustees to pay or refuse to pay claims; and
- provide for the exercise of discretions under the standards, including discretions to approve, impose, adjust or exclude particular prudential requirements in relation of an approved scheme; and
- apply, adopt or incorporate a law or instrument, or a provision of a law or instrument, as in force from time to time.

The clause also has several other notes—

- an Act that authorises the making of a statutory instrument (eg ***prudential standards***) also authorises an instrument to be made with respect to any matter required or permitted to be prescribed under the authorising law or that is necessary or convenient to be prescribed for carrying out or giving effect to the authorising law (see Legislation Act, s 44);
- the text of an applied, adopted or incorporated law or instrument, whether applied as in force from time to time or as at a particular time, is taken to be a notifiable instrument if the operation of the Legislation Act, s 47 (5) or (6) is not disapplied (see s 47 (7));
- a notifiable instrument must be notified under the Legislation Act.

The clause also explains that a determination of ***prudential standards*** under it is a disallowable instrument, and has a note—a disallowable instrument must be notified, and presented to the Legislative Assembly, under the Legislation Act. The clause also defines the meaning of the term ***prudential matters***, in relation to a fidelity fund scheme approved under the Bill, for the purposes of the clause. The clause explains that the term ***prudential matters*** means matters relating to the conduct by the trustees of the scheme of any of the scheme's affairs in a way that keeps the scheme's affairs in a sound financial position with integrity, prudence and professional skill.

Clause 104 creates a strict liability offence in respect of each of the trustees of a clause **96** approved scheme if the trustees fail to ensure that the scheme complies with the ***prudential standards*** referred to in clause **103**. The clause specifies a maximum respective penalty of 60 penalty units for the offence, the same amount for the corresponding offence in the *Building Act 1972*.

Clause 105 entitles the planning and land authority to, by written notice given to the trustees of a clause **96** approved scheme, require the trustees to comply with the provision of the ***prudential standards*** within a stated time. The ***prudential standards*** are determined under clause **103**. The clause requires the trustees to comply with the notice despite anything in the trust deed or in any contract or arrangement to which the trustees are party. The clause creates a strict liability offence in respect of each of the trustees of an approved scheme if the trustees fail to comply with a notice given to the trustees under the clause. The clause specifies a maximum respective penalty of 60 penalty units for the offence, the same amount for the corresponding regulatory offence in the *Building Act 1972*. The clause also describes 2 circumstances, either or both of which must exist for the clause to apply—it applies if the planning and land authority is satisfied on reasonable grounds that an approved scheme is contravening a provision of the ***prudential standards*** or is likely to contravene a provision of the ***prudential standards*** in a way that is likely to give rise to prudential risk.

Clause 106 entitles the planning and land authority to, by written notice given to the trustees of a clause **96** approved scheme, to require the trustees to give the authority stated information about anything relevant to the scheme's ability to meet its liabilities and potential liabilities at a particular date or time or at particular intervals. It sets out some examples of what that stated information may include information about—

(a) the scheme's liabilities and potential liabilities; and

(b) contributions to the scheme; and

(c) administrative or other costs of the scheme; and

(d) claims received by the scheme.

The clause has a note that an example is part of the Act, is not exhaustive and may extend, but does not limit, the meaning of the provision in which it appears (see Legislation Act, s 126 and s 132).

The clause requires a notice under it to state a reasonable period for complying with the notice. It lists some things that the notice is entitled to require information about in respect of claims received by the scheme, but explains that the list does not limit what the notice may require—

(a) the number of claims received by the scheme; and

(b) the amount of each claim; and

(c) the number of claims that have been paid; and

(d) the amount paid on each claim; and

(e) if a claim was rejected—the reason for its rejection.

The clause creates a strict liability offence in respect of each of the trustees of a clause **96** approved scheme if the trustees fail to comply with a notice given to the trustees under the clause. The clause specifies a maximum respective penalty of 60 penalty units for the offence, the same amount for the corresponding offence in the *Building Act 1972*.

Clause 107 entitles the planning and land authority to take action under that clause in relation to a fidelity fund scheme, that has an approval under clause **96**, on any of grounds listed under subclause (1). The grounds are—

(a) the trustees of the scheme have contravened this Bill or another Territory law in relation to the scheme; (note—a reference to an Act includes a reference to the statutory instruments made or in force under the Act, including regulations and disallowable instruments (see Legislation Act, s 104);

(b) the scheme is insolvent and is unlikely to return to solvency within a reasonable time;

(c) the scheme has inadequate capital and is unlikely to have adequate capital within a reasonable time;

(d) the scheme is, or is likely to become, unable to meet its liabilities;

(e) there is, or there may be, a risk to the security of the scheme's assets;

(f) there is, or there may be, a sudden deterioration in the scheme's financial condition;

(g) the scheme has ceased to issue fidelity certificates in the ACT;

(h) a ground prescribed under the prudential standards exists for the suspension or cancellation of the approval of the scheme.

The clause also entitles the planning and land authority to, in writing, suspend or cancel the clause **96** approval of a fidelity fund scheme. However it provides prerequisites that must all have been fulfilled before that entitlement can be exercised—

- if the planning and land authority proposes to suspend or cancel the approval of the scheme, the authority must give the trustees of the scheme a written notice—

  (a) stating the grounds on which the authority proposes to suspend or cancel the approval; and

  (b) stating the facts that, in the authority's opinion, establish the grounds; and

  (c) telling the trustees that the trustees may, within a stated reasonable time, give a written response to the authority about the matters in the notice; and

- after considering any response given to that notice the planning and land authority must to be satisfied that the grounds for suspending or cancelling the approval have been established.

The clause also requires the planning and land authority to give written notice to the trustees of a clause **96** approved scheme of any decision the authority makes under the clause to suspend or cancel the scheme's approval. It stipulates that suspension or cancellation of an approval under it takes effect on the day when notice of the suspension or cancellation is given to the trustees or, if the notice states a later date of effect, that date. It indicates that such a suspension or cancellation is a notifiable instrument and has a note—a notifiable instrument must be notified under the Legislation Act.

Clause 108 entitles the trustees of a clause **96** approved scheme to request the planning and land authority to cancel that approval. It entitles the planning and land authority to decide to respond to such a request by so cancelling the approval of the scheme. The clause also requires the planning and land authority to give written notice to the trustees of a fidelity fund scheme of any decision the authority

makes under it to cancel the scheme's approval. It indicates that such a cancellation is a notifiable instrument and has a note—a notifiable instrument must be notified under the Legislation Act.

Clause 109 entitles the planning and land authority to apply to the Supreme Court for orders to give effect to, or consequential on, a Division 6.4 suspension or cancellation of a clause **96** approval of a fidelity fund scheme. If that application is made under subclause (1), the clause entitles the Supreme Court to make the orders it considers just, including—orders for the winding-up of the scheme and orders in relation to the assets and liabilities of the scheme.

Clause 110 requires the trustees of a fidelity fund scheme, that has a clause **96** approval, to have an address for service in the ACT for the Bill, at all times. The clause stipulates that such an address becomes the address for service for the trustees when written notice of the address is given by the trustees to the planning and land authority, and that the address continues to be the address for service until the planning and land authority is given written notice by the trustees of another ACT address for service for the trustees.

Clause 111 requires trustees of a fidelity fund scheme, that has a clause **96** approval, to appoint an auditor for the scheme and an actuary for the scheme. It has a note—for the making of appointments (including acting appointments), see Legislation Act, div 19.3. The clause also requires those trustees to appoint someone else to be auditor or actuary for the clause **96** approved scheme within 6 weeks after a person stops being the auditor or actuary for the clause **96** approved scheme. The clause also sets out 2 criteria both of which must be satisfied as some of the prerequisites entitling a person to hold an appointment as auditor or actuary for a clause **96** approved scheme—the planning and land authority must have approved the appointment and its terms and the approval has not been revoked. The clause also prevents the appointment of a person as auditor or actuary for a clause **96** approved scheme from taking effect while an appointment of someone else in that position is current.

Clause 112 entitles the trustees of a clause **96** approved scheme to, in writing, ask the planning and land authority to approve the appointment of a person as auditor for the scheme or to approve the appointment of a person as actuary for the scheme. It entitles the planning and land authority to approve that appointment but only if the authority is satisfied that the person meets the eligibility criteria for the appointment prescribed under the ***prudential standards***. The ***prudential standards*** are determined under clause **103** of the Bill. The clause requires the planning and land authority to give the trustees notice of the authority's decision to approve or refuse to approve the appointment under it. If the planning and land authority refuses under the clause to approve an appointment, the clause requires the notice under the clause to include the reasons for the refusal.

Clause 113 entitles the planning and land authority to, in writing, revoke the approval of a person's appointment as auditor or actuary for a clause **96** approved scheme. It lists the circumstances of which 1 or more must exist before that entitlement can be exercised—the authority must be satisfied that the person—

- has failed to exercise adequately and properly the functions of the appointment under the Bill. (Note—a reference to an Act includes a reference to the statutory instruments made or in force under the Act, including regulations (see Legislation Act, s 104)); or
- does not meet 1 or more of the criteria for fitness and propriety prescribed under the ***prudential standards***. (The ***prudential standards*** are determined under clause **103** of the Bill); or
- does not meet the eligibility criteria for the appointment prescribed under the ***prudential standards***.

The clause stipulates that the revocation of an approval under it takes effect on the day the revocation is made. It requires the planning and land authority to give a copy of any revocation to the person whose appointment it revokes and to the trustees of the approved scheme.

Clause 114 lists circumstances that relate to a person holding an appointment as auditor or actuary of a clause **96** approved scheme. It indicates that if 1 or more of those circumstances exist in relation to a person then that circumstance stops the person holding an appointment as auditor or actuary of an approved scheme. It is intended that that appointment stop when the circumstance takes effect. The circumstances are—

- the approval of the person's appointment is revoked under clause **113**; or
- the person resigns the appointment by giving written notice to the trustees of the approved scheme; or
- the trustees end the appointment by giving written notice to the person.

Clause 115 requires the trustees for a clause **96** approved scheme to give the planning and land authority written notice of the appointment of a person as auditor or actuary for the scheme and anything else prescribed under the ***prudential standards***. (The ***prudential standards*** are determined under clause **103** of the Bill). It requires that notice to be given within 14 days after the appointment is made. The clause also requires the trustees for a clause **96** approved scheme to give the planning and land authority written notice of a person having stopped being auditor or actuary for the scheme and of the reasons for and circumstances of that stoppage. The clause requires that notice to be given within 14 days after the stoppage commences. However it explains that the requirement to give notice of that stoppage does not apply to the revocation by the planning and land authority of the approval of a person's appointment.

Clause 116 creates a strict liability offence in respect of either, or both, the auditor or actuary for a clause **96** approved scheme where the auditor or actuary contravenes the ***prudential standards*** in relation to the exercise of his or her functions as auditor or actuary for the scheme. (The ***prudential standards*** are determined under clause **103** of the Bill). The clause specifies a maximum respective penalty of 60 penalty units for the offence, the same amount for the corresponding offence under the *Building Act 1972*.

Clause 117 creates a strict liability offence in respect of either, or both, the auditor or actuary for a clause **96** approved scheme where the auditor or actuary fails to give the planning and land authority written notice about certain circumstances within 7 days after the day the auditor or actuary forms the belief that the circumstances exist. It lists the circumstances as being where the auditor or actuary forms the belief that the scheme is insolvent, or there is a significant risk that it will become insolvent, or the trustees have contravened the Bill or another Territory law in relation to the scheme. The clause explains that the circumstances only apply if the auditor or actuary fails to give the planning and land authority written notice about the circumstance or circumstances within 7 days after the day the auditor or actuary forms the belief that the circumstances exist. The clause specifies a maximum respective penalty of 100 penalty units, imprisonment for 1 year, or both, the same penalty for the corresponding offence in the *Building Act 1972*.

Clause 118 indicates that it only applies to a person who is, or has been, an auditor or actuary for clause **96** approved scheme. It entitles a person to give information to the planning and land authority about the approved scheme if the person considers that giving information will assist the authority to exercise the authority's functions under part 6 of the Bill. It entitles the planning and land authority to give a written notice to a person to require the person to give stated information about an approved scheme to the authority within a stated reasonable time. The clause limits the circumstances that the entitlement can be exercised to if the clause applies to the person. The clause creates a strict liability offence in respect of the person that is given a notice under subclause (3) if the person contravenes the notice. The clause specifies a maximum respective penalty of 100 penalty units, imprisonment for 1 year or both, to reflect the seriousness of the offence.

Clause 119 sets out certain things that the auditor of a clause **96** approved scheme is required to do—in accordance with the ***prudential standards*** (the ***prudential standards*** are determined under clause **103** of the Bill)—

- exercise the functions of auditor for the scheme prescribed under the ***prudential standards***; and
- find out and report on whether the trustees of the scheme are complying with the ***prudential standards***; and

- prepare, and give to the trustees of the scheme, any reports (***subclause (1) (c) reports***) required under the ***prudential standards*** to be prepared by the auditor; and

- give the trustees any certificates (***subclause (1) (d) certificates***) relating to the scheme's accounts that are required under the ***prudential standards*** to be prepared by the auditor.

The clause stipulates that ***subclause (1) (c) reports*** must deal with everything required under the ***prudential standards*** to be dealt with in the report, and that ***subclause (1) (d) certificates*** must contain statements of the auditor's opinion on the matters required under the ***prudential standards*** to be dealt with in the certificate.

Clause 120 sets out certain things that the actuary of a clause **96** approved scheme is required to do—in accordance with the ***prudential standards*** (the ***prudential standards*** are determined under clause **103** of the Bill)—

- exercise the functions of actuary for the scheme prescribed under the ***prudential standards***; and

- prepare, and give to the trustees of the scheme, the reports (***subclause 120 (1) (b) reports***) (if any) required under the ***prudential standards*** to be prepared by the actuary.

The clause stipulates that ***subclause 120 (1) (b) reports*** must deal with everything required under the ***prudential standards*** to be dealt with in the report.

Clause 121 requires the trustees of a clause **96** approved scheme to, in accordance with the ***prudential standards***, give to the planning and land authority a copy of each certificate given to the trustees under clause **119** (Auditor's role); and the reports mentioned in that clause and clause **120** (Actuary's role). The ***prudential standards*** are determined under clause **103** of the Bill. The clause creates a strict liability offence in respect of the trustees if the trustees contravene it. The clause specifies a maximum respective penalty of 60 penalty units, the same amount for the corresponding offence in the *Building Act 1972*.

Clause 122 entitles the planning and land authority to, by written notice given to the trustees of an approved scheme, require the trustees to appoint, at the scheme's expense, an additional actuary (the ***special actuary***) to investigate completely or partially the scheme's liabilities as at a particular time and to give the authority a written report within a stated period. It prohibits a ***special actuary*** from being the actuary appointed under clause **111** (Appointment of auditor and actuary for approved scheme) or being a trustee or officer of the scheme. Subclause **122** (3) requires the trustees: 1) to appoint a ***special actuary,*** and 2) to give the planning and land authority written notice of the special actuary's name; both within 7 days after the day the trustees are given a clause **122** notice. The clause creates a strict liability offence in respect of the trustees if the trustees fail to

comply with subclause **122** (3). The clause specifies a maximum respective penalty of 100 penalty units to reflect the seriousness of the offence.

Clause 123 entitles the planning and land authority to give written notice to the trustees of a clause **96** approved scheme that a ***special actuary*** is not acceptable to the authority. It explains that it only applies if the trustees of an approved scheme notify the planning and land authority of the special actuary's name under clause **122** (3). The clause limits the time period during which the authority can give a clause **123** notice to the period that is 7 days after the authority is given the name under clause **122** (3). Section **123** (3) requires the trustees to appoint a different ***special actuary***; and give the planning and land authority written notice of the name of that ***special actuary*** if the following circumstances exist—Clause **123** applies, and the trustees are given a notice under subclause **123** (2). The clause requires the trustees to make that appointment and notify the authority of that name within 7 days after the day the trustees are given a clause **123** notice. It explains that the authority's entitlement to give a clause **123** (2) notice applies regardless of whether or not the unacceptable special actuary's name was notified under clause **122** (3) or clause **123** (3) (b). It is intended that if a replacement special actuary is appointed under clause **123** (3) (a) that appointment supersedes the appointment of the special actuary mentioned in the clause **123** notice, and therefore that mentioned actuary's appointment stops on the commencement of the superseding appointment.

Clause **123** creates a strict liability offence in respect of the trustees if the trustees fail to comply with subclause **123** (3). The clause specifies a maximum respective penalty of 100 penalty units to reflect the seriousness of the offence.

Clause 124 requires, at clause **124** (1), the trustees of a clause **96** approved scheme to ensure that a ***special actuary's*** report is given to the planning and land authority within 30 days after the authority gave a notice under clause **122** (1) or within any additional further time the authority allows in writing. Clause **122** explains what a ***special actuary*** is. Clause **124** lists things that it requires a ***special actuary's*** report to contain—it must be signed by the special actuary and it must contain a statement of the special actuary's opinion about each of the following—

(a) the adequacy of the whole or part of the amount stated in the scheme's accounts in relation to its liabilities, and the amount that the actuary considers would be adequate in the circumstances;

(b) the accuracy of any relevant valuations made by the actuary;

(c) the assumptions used by the actuary in making the valuations;

(d) the relevance, appropriateness and accuracy of the information on which those valuations were based;

(e) anything else in relation to which the **prudential standards** require a statement of the actuary's opinion to be included in the report. (The **prudential standards** are determined under clause **103** of the Bill).

Clause **124** creates a strict liability offence in respect of the trustees if the trustees fail to comply with subclause **124** (1). The clause specifies a maximum respective penalty of 100 penalty units to reflect the seriousness of the offence.

Clause 125 specifies eligibility criteria that apply to the appointment of a ***special actuary***. (Clause **122** explains what a ***special actuary*** is). The clause prohibits a person from being appointed as a ***special actuary*** for clause **122** (Investigation of liabilities by special actuary) except where the person is a Fellow of The Institute of Actuaries of Australia or where the planning and land authority has, in writing, approved the person as an actuary for that clause. The clause limits the entitlement of the planning and land authority to approve a person for the clause—the planning and land authority may approve a person only if satisfied that the person has actuarial qualifications and experience that make the person an appropriate person to exercise the function of a ***special actuary*** for clause **122**.

Clause 126 creates a strict liability offence in respect of the trustees of a clause **96** approved scheme if the trustees fail to make arrangements necessary to enable the auditor or actuary for the scheme, or any ***special actuary*** for the scheme, to exercise his or her functions in relation to the scheme. Clause **122** explains what a ***special actuary*** is. The clause specifies a maximum respective penalty of 60 penalty units, the same amount for the corresponding offence in the *Building Act 1972*.

Clause 127 has a provision intended to ensure the auditor, actuary or any special actuary for a clause **96** approved scheme does not incur civil liability, or criminal liability under the *Defamation (Criminal Proceedings) Act 2001*, for an act or omission done honestly and without negligence for part 6 of the Bill.

Part 7 Administration

The part's provisions are based on the corresponding provisions in the *Building Act 1972.*

Clause 128 entitles the construction occupations registrar to appoint a person to be a building inspector for the Bill. The clause has 2 notes—1) for the making of appointments (including acting appointments), see Legislation Act, div 19.3; and 2) in particular, a person may be appointed for a particular provision of a law (see Legislation Act, s 7 (3)) and an appointment may be made by naming a person or nominating the occupant of a position (see Legislation Act s 207).

Clause 129 requires the construction occupations registrar to issue a building inspector with an identity card that states the person is an inspector for the Bill, or stated provisions of the Bill, and shows all of the following—

(a) a recent photograph of the person; and

(b) the name of the person; and

(c) the date of issue of the card; and

(d) a date of expiry for the card; and

(e) anything else prescribed under the regulations.

The clause requires, under subclause (2), a person who ceases to be an inspector to return his or her identity card to the construction occupations registrar as soon as practicable, but no later than 7 days after ceasing to be an inspector. The clause creates a strict liability offence in respect of a person who ceases to be an inspector and fails to comply with subclause (2). The clause specifies a maximum respective penalty of 1 penalty unit, the same amount for the corresponding offence in the *Building Act 1972*.

Clause 130 entitles a building inspector to inspect ***building work*** for which a ***building approval*** has been issued to decide whether the building work is being, or has been, carried out in accordance with the Bill. (The Bill defines what ***building work*** and ***building approval*** means). The clause has a note—a reference to an Act includes a reference to the statutory instruments made or in force under the Act, including regulations and the building code (see Legislation Act, s 104).

Clause 131 entitles the construction occupations registrar to, in writing, authorise a building inspector to carry out an inspection of certain ***building work*** or certain buildings at any reasonable time. The clause also entitles the registrar to authorise the inspector to do 1 or more of the following—

- make tests of the soil or the building materials used or to be used in the building work or building;
- order the opening or cutting into or pulling down of any building work.

However, the clause sets out the circumstances that must exist for it to apply. The construction occupations registrar must have reasonable grounds for suspecting 1 or more of the following:

(a) a building approval has not been issued for building work that is being, or has been, carried out; or

(b) building work is not being, or has not been, carried out in accordance with the approved plans for the work or a notice under part 4 of the Bill (Stop and demolition notices); or

(c) if plans or plans and specification have been approved under the Bill for the erection or alteration of a building—

(i) the completed building has deteriorated, or is likely to deteriorate, so that building is, or is likely to become, unfit for use as a building of the

class stated, or for the purpose stated, in the plans or plans and specifications approved in relation to the most recent building work carried out in relation to the building; or

(ii) the building is being used other than as a building of the class stated, or for the purpose stated, in the plans or plans and specifications approved in relation to the most recent building work carried out in relation to the building; or

(d) for a building other than a building to which paragraph (c) applies—the building has deteriorated to the extent that it is unfit for any use; or

(e) a building or part of a building is no longer structurally sound; or

(f) because of the use to which the building has been or is being put, the maximum safe live load has been or is being exceeded or the load on the building has been or is in excess of the load that the building was designed to carry; or

(g) a building or part of a building is unsafe because of fire hazard or unfit for use because of a danger to health.

Clause 132 stipulates who must bear the costs (the ***inspection costs***) of any pulling down, opening or cutting into the building work carried out during an inspection under clause **130**. It indicates that if, on inspection, it is found that there are grounds for the giving of a ***stop notice***, the builder must bear the inspection costs, whereas if, on inspection, it is found that there are no grounds for the giving of a ***stop notice***, the Territory must bear the ***inspection costs*** and the costs of making good any damage to the building work caused by the inspection.

Clause 133 entitles the planning and land authority to, in writing, authorise a building inspector, with the assistance the construction occupations registrar considers necessary, to enter on the land where the building work mentioned in the notice has been, is being or should have been carried out and to carry out the requirements of a notice under part 4 (Stop and demolition notices). The clause limits the circumstance under which the entitlement may be exercised to when the requirements of that notice under have not been complied with in accordance with the notice. An intention is to ensure work is done to make a building safe to remove a risk to the public, for example.

Clause 134 entitles a building inspector, who is authorised under clause **130** or **131** to inspect a building or building work, to enter on land or premises where the building has been erected or building work is being or has been carried out. An intention is to allow the inspector reasonable access to inspect all of the building or building work. The entitlement is particularly relevant in circumstances of building work having been carried out without a required building approval having been obtained. In that case, the inspector may require access into a private dwelling, for example, to inspect building work that is a partial demolition and extension to

the dwelling. The inspection is warranted in that case as it may detect that the building work is structurally unsound and thereby puts at risk the safety of the dwelling's occupants when they use the parts of the dwelling that are adjacent to the extension. However, the clause stipulates that the building inspector is not authorised to remain on the land or premises if, when asked by the occupier of the land or premises, the building inspector does not produce—

(a) if authorised under clause **130**—the inspector's identity card; or

(b) if authorised under clause **131**—a written certificate signed by the construction occupations registrar that the inspector is authorised to enter the land or premises.

Clause 135 creates an offence in respect of a person if—

(a) the person knows that, or is reckless about the fact that, a person is a building inspector; and

(b) the person obstructs, hinders, intimidates or resists the building inspector in the exercise of the inspector's functions.

The clause stipulates that an offence for (b) is a strict liability offence. The clause specifies a maximum respective penalty of 50 penalty units, imprisonment for 6 months or both in respect of any offence under the clause, the same penalty for the corresponding offences under the *Building Act 1972*.

Part 8 Building code

Part 8 mainly establishes what the building code is and related administrative matters. The part's provisions are based on the corresponding provisions in the *Building Act 1972*. The building code contains fundamental technical standards for construction of buildings and structures. The Territory is formally consulted on, and actively involved in, proposed changes to the Building Code of Australia. Therefore, the Territory has a degree of influence over the content of such amendments and thereby forewarning of potential impact on Territory legislation.

Clause 136 defines the term ***building code*** for the Bill. It means the Building Code of Australia prepared and published by the Australian Building Codes Board, as amended from time to time by the Australian Building Codes Board, together with the Australian Capital Territory Appendix to the Building Code of Australia. The intention is that unless a provision of the Bill provides otherwise, where the term ***building code*** is used it refers to the version of the building code that is in force at the time the provision applies, and includes the provisions of the Australian Capital Territory Appendix to the Building Code of Australia. The clause entitles the Minister to, in writing, make an Australian Capital Territory Appendix to the Building Code of Australia. The clause has a note that this includes the power to amend or repeal the Appendix (see Legislation Act, s 46 (2)). The clause stipulates that the Australian Capital Territory Appendix to the Building Code of Australia is a disallowable instrument. The clause has two other notes, that a

disallowable instrument must be notified, and presented to the Legislative Assembly, under the Legislation Act; and that an amendment or repeal of the Australian Capital Territory Appendix to the Building Code of Australia is also a disallowable instrument (see Legislation Act, s 46 (2)). The clause indicates that the Legislation Act, clause 47 (6) does not apply to the Building Code of Australia. The intention is that the building code not be required to be notified on the legislation register. That is necessary because it is impractical to notify that code on the register due to its large size, cost and copyright restrictions.

That code's provisions apply nationally. Its appendixes, such as the above-mentioned ACT appendix are necessary to facilitate the provision of State and Territory variations from, or additions to, the code's provisions. For example, the ACT appendix could include provisions covering domestic waste collection from multiunit buildings to cater for waste collection regimes that are peculiar to the ACT.

Clause 137 requires notice of the publication of each edition of the Building Code of Australia and each amendment of it by the Australian Building Codes Board to be published, in a ***daily ACT newspaper***. The clause defines the term ***daily ACT newspaper*** as a daily newspaper printed and published in the ACT. The intention is to inform the public of changes. The clause stipulates that a notice under it is a notifiable instrument and a note explains the requirements for a notifiable instrument under the Legislation Act.

Clause 138 requires the construction occupations registrar to keep a copy of the ***building code*** at his or her office and entitles any person to inspect the ***building code*** kept by the registrar. However it indicates that that entitlement may only be exercised on request to the registrar and when the registrar's office is open for business. It is intended that the office copy of the building code may be in electronic form stored at a source that is not at the registrar's office but can be immediately displayed for reading at the registrar's office. For example the copy could be held on a computer outside of the registrar's office if another computer, which is at that office, can immediately access the copy and display it at the registrar's office so it can be readily read at that office.

Clause 139 stipulates that in a proceeding before a court or the administrative appeals tribunal, evidence of the ***building code*** as in force on a stated date or during a stated period may be given by the production of an office copy of the building code certified by the construction occupations registrar as a true copy as at the date or during the period.

Part 9 Limitation on liability

Part 9 mainly provides limitations on certain entity's liabilities to pay for damages arising from certain defective work or performing certain functions. It's provision are based on the corresponding provisions in the *Construction Practitioners Registration Act 1998*. The limitations are necessary in that they contribute to the

viability of the building and building certification industries in the Act by providing certainty about the liabilities that the part covers.

Clause 140 defines the term ***building action*** for part 9—

building action—

(a) means an action (including a counterclaim) for damages for loss or damage in relation to—

(i) defective ***building work***; or

(ii) defective construction work other than ***building work***; or

(iii) the negligent exercise by a licensed construction practitioner of a function as a certifier, or the negligent failure to exercise such a function; but

(b) does not include an action for damages for death or personal injury.

(The terms ***licensed construction practitioner*** and ***certifier*** are defined the Bill's dictionary).

Clause 141 has the intention of ensuring that certain liabilities for damages amounts are divided among those responsible. Subclause **141** (1) requires a court that decides an award of damages in a ***building action*** to give judgment against each defendant to the action who is found to be jointly or severally liable for the damage for the proportion of the total amount of the damages that the court considers to be just, having regard to the extent of that defendant's responsibility for the loss or damage. Subclause **141** (2) stipulates that the liability for damages of a person found to be liable for damages in a ***building action*** is limited to the amount for which judgment is given against the person, even if another Act or a rule of law provides otherwise. A person found to be liable for a proportionate part of damages under subclause (1) in a building action is not liable to contribute to the damages apportioned to anyone else in the action or to indemnify any other person in relation to the damages.

Clause 142 limits the period when a ***building action*** may be taken to no more than 10 years. It sets out criteria for determining when the 10-year period commences, and how the limitation operates. The standard period is 10 years from the date when completion is certified under the Bill but provision is made for circumstances in which no certificate is issued, a person ceases to act as certifier for the work or a period less than 10 years is relevant.

The clause defines what the term ***building*** means for the clause—***building***, in relation to building work that consists of, or includes, the alteration of a building, means the building as altered.

Part 10 Miscellaneous

Clause 143 sets out some methods for serving notices or other documents under the Bill. It provides that a notice or other document under the Bill addressed to 1 person may be served by attaching the notice in a prominent position on the building or, for an alteration to a building, on the part of the building being altered, to which the notice relates. It further provides that if a notice under the Bill is addressed jointly to 2 or more people, a number of copies of the notice equal to the number of people to whom the notice is addressed must be signed by the person giving the notice, and 1 of those copies must be served on each of the people. The clause also has a note—for how documents may also be served, see Legislation Act, pt 19.5.

It is intended that where a notice is addressed to an entity that could be a number of people, such as to "the partners", "the director", "the trustees", then the notice can be taken as being addressed to one person for the purposes of the clause.

Clause 144 has an intention of providing privacy in respect of building plans. It prohibits copies of plans submitted under the Bill from being given to anyone except in accordance with the instructions of—

(a) the lessee or the owner of the parcel of land where the building to which the plans relate is erected; or

(b) if the plans relate to a unit within the meaning of the *Unit Titles Act 2001*, the proprietor of the unit.

Clause 145 entitles applications to be made to the administrative appeals tribunal for the review of an ***appealable decision***. It stipulates that the regulations may prescribe what decisions are ***appealable decisions*** and the ***relevant person*** for each ***appealable decision***. Where the matter under review involves a development within the meaning of the Land Act, the clause prohibits the administrative appeals tribunal from—

(a) varying a decision issuing a ***stop notice*** under clause **53** or a notice under clause **58** (2) or (4) (Further notices relating to stop notices) or **62** (1) (Notice to carry out building work), or from substituting a decision for such a decision it has set aside, in a way that would be contrary to an approval of the development; or

(b) varying a decision issuing a notice under clause **58** (4), or from substituting a decision for such a decision it has set aside, unless the development has been approved.

Subclause **145** (3) requires the construction occupations registrar to give written notice of the decision to the ***relevant person*** in relation to the decision, if the registrar makes an ***appealable decision***. (The regulations may prescribe what decisions are ***appealable decisions*** and the ***relevant person*** for each ***appealable decision***). Clause **145** requires a subclause **145** (3) notice to be in

accordance with the requirements of the code of practice in force under the *Administrative Appeals Tribunal Act 1989*, section 25B (1).

Clause 146 assigns liability for payment of the costs of certain work—the costs incurred in the carrying out of the requirements of a notice under part 4 (Demolition and ***stop notice*** s) or a decision of the construction occupations registrar by a building inspector or his or her assistants under clause **131** (Inspection of building work where no approval) or clause **133** (Power to authorise required work) is recoverable as a debt owing to the Territory from the person who was required to carry them out by the notice or order.

Clause 147 stipulates that certain things are evidence of certain matters in a proceeding before a court or the administrative appeals tribunal. It stipulates that in a proceeding before a court or the administrative appeals tribunal—a document purporting to be a copy of a notice under the Bill and certified as a true copy by the construction occupations registrar or of a person authorised in writing by the registrar must be received in evidence and must be taken without further proof to be a true copy of the notice, and that a notice certified as a true copy under the clause must be taken, unless the contrary is proved, to have been given by the person purporting to give it and to have been given on the date stated in the certified copy of the notice.

The clause also stipulates that in a proceeding before a court a document purporting to be a certificate given by the construction occupations registrar and certifying that there was a building approval in force for stated building work on a stated date or during a stated period is evidence that on the stated date or during the stated period the building approval was in force, and that a document purporting to be a certificate given by the registrar and certifying that there was no building approval in force for stated building work on a stated date or during a stated period is evidence that on the stated date or during the stated period no building approval was in force.

The clause also stipulates that in a proceeding before a court a certificate signed by the construction occupations registrar certifying that a document attached to the certificate is a true copy of plans approved by the registrar under the Bill, or of a part of such plans, is evidence of the plans or of the part as so approved.

The clause also stipulates that in a proceeding before a court, a certificate signed by the construction occupations registrar and certifying that, at a stated date a certificate of occupancy had not been issued for a stated building or a stated part of the building is evidence that, at that date, a certificate of occupancy had not been issued for the building or part of a building.

The clause also has a note—a document that purports to be signed by the construction occupations registrar is presumed to have been signed by the registrar unless the contrary is proved (see Evidence Act 1995 (Cwlth), s 150.

Clause 148 intends to protect the construction occupations registrar and building inspectors, and people who used to be the registrar or building inspectors, from certain civil and criminal liabilities. It provides that a building inspector, or a former building inspector, is not civilly or criminally liable in relation to anything done or omitted to be done honestly by him or her in the exercise of a function under the Bill. The clause further provides that a civil or criminal liability that would, apart from this the clause, attach to the construction occupations registrar or a building inspector attaches instead to the Territory.

Clause 149 entitles the Minister to, in writing, determine fees for the Bill. It has a note that the Legislation Act contains provisions about the making of determinations and regulations relating to fees (see Legislation Act pt 6.3). However, the clause requires a fee for the issue of a building approval under clause **28** (2) (issue of building approval) to only be determined by reference to the value of building work for which the building approval has been issued. The clause indicates that a determination under it is a disallowable instrument, and it has a note that a disallowable instrument must be notified, and presented to the Legislative Assembly, under the Legislation Act.

Clause 150 entitles the construction occupations registrar to, in writing, approve forms for the Bill. It requires the approved form to be used for a particular purpose under the Bill if the registrar approves a form for that particular purpose. The clause has a note that other provisions about forms appear in the Legislation Act. The clause indicates that an approved form is a notifiable instrument and it has a note about requirements for a notifiable instrument under the Legislation Act.

Clause 151 entitles the Executive to make regulations for the Bill. It has a note that regulations must be notified, and presented to the Legislative Assembly, under the Legislation Act. The clause entitles the regulations to make provision in relation to the approval of building work in relation to particular buildings and anything else in relation to the approval of building work on particular buildings. The intention is to allow the regulations to either (or both) add to requirements for prescribed building work approvals that already apply or exempt prescribed building work from approval requirement that would otherwise apply. For example the regulations could prescribe that an aviation authority approve all proposed building work for erection of buildings of more than 200 storeys, in addition to any other required approval. Another example is that the regulations could prescribe that stated kinds of building work for erection of dwellings do not need any kind of approval under the Bill or regulations. The clause also entitles the regulations to prescribe offences for contraventions of the regulations and prescribe maximum penalties of not more than 10 penalty units for offences against the regulations.

Part 11 Transitional provisions

Many of the functions of the building controller under the *Building Act 1972* are comparable to functions that the construction occupations registrar is responsible

for under the Bill. Most of part 11's provisions provide continuity of matters from the *Building Act 1972* to the Bill.

Clause 152 defines some terms for part 11:

Building Act 1972 means that Act as in force immediately before the commencement of the Bill;

building controller means the ***building controller*** mentioned in the *Building Act 1972* (repealed) s 5 (1);

commencement day means the day this Bill commences.

Clause 153 requires a thing to be given to the construction occupations registrar under the Bill if the thing was required to be given to the building controller or a deputy building controller and if, immediately before commencement day—

(a) a person was required to give the building controller or a deputy building controller something; and

(b) the person had not given the building controller or deputy the thing.

It is intended that where the clause applies the time required to give the thing to the building controller or a deputy building controller is also the time required to give it to construction occupations registrar.

The Bill requires building work to be carried out in accordance with the building code. However **clause 154** exempts the Territory from having to comply with other requirements in relation to building work that the Territory carries out in the circumstances set out in the clause. On 1 July 2001 the approval requirements of the *Building Act 1972* were extended the Act to unleased land, in accordance with the Sherman Report. The amending legislation allowed for exemptions, including one applicable to projects for which the government had entered into commitments at prices that did not include approval costs. The circumstances are that the Minister certifies that a contract in relation to the work was entered into before 1 July 2001. The clause clarifies that the exemption has effect despite the Legislation Act, section 121 (Binding effect of Acts).

On 9 December 1992 provisions in the *Building Act 1972* commenced which had the effect of exempting certain building work from the application of certain provisions of that Bill, including building work that commenced prior to the exemptions taken effect. The *Building Bill 1972* clarified that the exemptions also applied to such earlier commenced work. **Clause 155** has an intention of ensuring that same exemption concepts apply in the Bill. The provisions stipulate how they limit the operation of part 3 (Building work), part 5 (Building occupancy), Section **53** (1) (g) (certain ***stop notice*** s) and clause **62** (Notice to carry out building work) of the Bill in relation to ***exempt buildings***. It defines the meaning of the term ***exempt buildings*** for the clause—***exempt building*** includes a building

prescribed under the *Building Act 1972* as in force at the relevant time, section 6AA.

Clause 156 has an intention of ensuring things done by certifiers, including government certifiers, immediately before commencement day are taken to have been done under the Bill, and for their appointments as certifier that were then in effect to be in effect under the Bill. That is to ensure certifiers do not have to attend to resubmitting things or being reappointed certifier merely because of the repeal of the *Building Act 1972* and commencement of the Bill.

Clause 157 provides that to remove any doubt, the Bill applies to building work, whether done before or after commencement day. An example of the application of the clause is as follows—a building was constructed in 1993. The clause is not the subject of a certificate under part 5 of the Bill (Building occupancy). Under that part it is unlawful to occupy or use the building without such a certificate. That applies despite the building having been built prior to commencement day.

Clause **50** of the Bill requires certifiers to notify of certain breaches of the Bill. **Clause 158** provides that a reference in clause **50** to a contravention of the Bill is taken to include a reference to a contravention of the *Building Act 1972* as in force at the relevant time. An intention is that if the contravention is the kind that must be notified and the certifier is aware that when the contravention occurred it was a contravention of the *Building Act 1972* as in force at the relevant time the requirement to notify still applies despite that Bill having been repealed.

Clause 159 requires people to do a specific thing under the Bill if the thing was required to be done under the *Building Act 1972,* if the clause applies. It stipulates that the time for doing the thing ends when it would have ended if the *Building Bill 1972* had not been repealed and if the thing required the giving of something to the building controller, the person complies with the requirement if the person gives the thing to the construction occupations registrar. The clause indicates that it applies if, immediately before commencement day—

- under the *Building Act 1972* (repealed), a person was required to do something; and
- immediately before commencement day the person had not done the thing.

The *Building Act 1972* contained a provision that related to a certificate under the *Canberra Sewerage and Water Supply Regulations 1933* as in force immediately before the repeal of the *Energy and Water Act 1988* for purposes relating to the certificate as a prerequisite to the issue of a certificate of occupancy under the *Building Act 1972*. The clause ensured those certificates continue to be valid despite repeal of the law they were issued under. **Clause 160** of the Bill has an equivalent provision with the same intention in relation to clause **69** (Certificate of occupancy) of the Bill.

Clause 161 provides that, to remove any doubt, clause **74** (Government buildings—application for fitness certificate) applies to a building whether erected before or after commencement day. An example of the application of the provision is as follows: a building was erected in 1923. The fact that it was erected so long before commencement day does not affect an entitlement to apply under clause **74** for a fitness certificate in respect of the building.

Section **76** stipulates that a person commits an offence if—

(a) the person occupies or uses, or allows someone else to occupy or use, a building or part of a building; and

(b) the construction occupations registrar has not issued a certificate of occupancy for the building or part of the building.

Whereas **clause 162** clarifies that that reference in clause **76** (1) (b) (Occupation and use of buildings) to the construction occupations registrar issuing a certificate of occupancy for the building or part of the building includes a reference to—

(a) the building controller issuing the certificate under the *Building Act 1972* as in force at any time; and

(b) for a building erected or altered before 1 September 1972 or to which the laws repealed by the *Building Act 1972* continued to apply while that Act was in force—a certificate for the building or part of the building issued in accordance with the *Canberra Building Regulations*, regulation 69A, as in force at the time of issue.

An intention is to ensure that certificates issued under laws since repeal still have some validity in respect to clause **76** (1) (b) (Occupation and use of buildings).

Clause 163 extends the meaning of the term builder for clause **84** (Definitions for pt 6): builder, in relation to residential building work or a residential building, to include a person whose name was notified to the relevant certifier under the *Building Act 1972*, section 37A (Notifications by owner of land in relation to building work) at any time before its repeal. The intention of the provision is to prevent the need to renotify the name for the purposes of clause **84** merely because of the repeal of the *Building Act 1972*.

Clause 164 provides that a person who was a building inspector under the *Building Act 1972* immediately before commencement day is a building inspector under the Bill and an identity card issued to a building inspector under the *Building Act 1972* and in force immediately before commencement day is taken to have been issued under the Bill. The intention of the provision is to prevent the need to reappoint building inspectors and reissue identity cards merely because of the repeal of the *Building Act 1972*.

Clause 165 provides that an approved scheme under the *Building Act 1972* is taken to be an approved scheme for this Bill. It relates to approval of fidelity fund

schemes under clause **96** of the Bill. An intention of the provision is to prevent the need to re-approve schemes merely because of the repeal of the *Building Act 1972*. For a corresponding reason, **clause 166** provides that a person who was an auditor or actuary under the *Building Act 1972* immediately before commencement day is taken to be an auditor or actuary under the Bill. Similarly, **clause 167** provides that the trustees are taken to have asked for a respective approval under the Bill, clause **112** (Approval of appointment of auditor or actuary) if before commencement day—

(a) the trustees of an approved scheme had asked for an approval under the *Building Act 1972* (repealed), section **83** (Approval of appointment of auditor or actuary); and

(b) the planning and land authority had not made a decision on the approval.

To facilitate that arrangement for auditors and actuaries **clause 168** provides that a reference in clause **118** (Giving of information to authority by auditor or actuary etc) to a person who has been an auditor or actuary for an approved scheme includes a reference to a person who has been an auditor or actuary for an approved scheme under *the Building Act 1972* as in force at any time.

To provide a continuity of certain inspection powers affected by the repeal of the *Building Act 1972* and commencement of the Bill, the meanings of certain terms used in clause **130** (Inspection where approval) and clause **131** (Inspection where no approval) are extended by **clause 169**—

this Act includes the *Building Act 1972* as in force at any time;

building approval includes a building approval under the *Building Act 1972* as in force at any time;

approved plans include approved plans under the *Building Act 1972* as in force at any time;

notice under part 4 includes a notice under the *Building Act 1972*, part 4 as in force at any time.

To provide a continuity of certain inspector's powers affected by the repeal of the *Building Act 1972* and commencement of the Bill **clause 170** provides that if, before commencement day the planning and land authority authorised a building inspector to enter land and carry out building work under the *Building Act 1972* (repealed), section 9 (4) and the building inspector had not carried out the work then the authorisation is taken to be an authorisation under the Bill, clause **133**.

Clause 171 provides that in clause **136** the Australian Capital Territory Appendix to the Building Code of Australia includes the latest Australian Capital Territory Appendix to the Building Code of Australia made under the *Building Act 1972*. An intention is to avoid the need to remake the appendix merely because of the repeal of the *Building Act 1972*.

Clause 172 provides that in part 9 the ***term building*** work includes building work under the *Building Act 1972* as in force at any time after 18 December 1998, in relation to which a building approval was issued after 18 December 1998. An intention is to clarify that part 9 applies in respect of building approvals issued prior to commencement day. On 18 December 1998 provisions commenced that initially established the entitlement for certifiers to issue building approvals and certify building work.

To provide a continuity of certain matters affected by the repeal of the *Building Act 1972* and commencement of the Bill **clause 173** provides that for clause **142** of the Bill—

(a) a certificate of completion includes a certificate of completion under the *Building Act 1972* (repealed); and

(b) a reference to an inspection or a certifier includes an reference to an inspection or a certifier under the *Building Act 1972* (repealed); and

(c) a reference to a notice under clause **24** (2) about the end of the certifier's appointment includes a reference to a certificate under the *Building Act 1972* (repealed), section 32 about the end of a certifier's appointment.

Similarly, to provide a continuity of certain matters affected by the repeal of the *Building Act 1972* and commencement of the Act, **clause 174** provides that a reference to a document mentioned in clause **147** (1) (c) includes a reference to a document purporting to be a certificate given by the building controller or construction occupations registrar and certifying that a stated builder was or was not the holder of a builder's licence for stated building work or a building licence included in a stated occupation class on a stated date or during a stated period. The clause also defines the meaning of certain terms used in the clause—

building approval—see the *Building Act 1972* (repealed) s 5 (1).

builder's licence—see the *Building Act 1972* (repealed).

building permit means a building permit issued under the *Building Act 1972* as in force as at the time of issue of the permit.

Similarly, to provide a continuity of certain matters affected by the repeal of the *Building Act 1972* and commencement of the Bill, **clause 175** provides that a reference in clause **147** (1) (f) to a certificate signed by the construction occupations registrar includes a reference to—

(a) a certificate issued by the building controller under the *Building Act 1972* as in force at the time of issue of the certificate; and

(b) for a building erected or altered before 1 September 1972 or to which the laws repealed by the *Building Act 1972* as in force at any time continued to apply while that Act was in force—a certificate for the building or part of the

building issued in accordance with the Canberra Building Regulations, regulation 69A, as in force at the time of issue.

Clause 176 has provisions about ***asbestos***. An intention is to ensure that every provision in the *Building Act 1972* that relates to building work that involves the removal or handling of asbestos, continues apply despite the repeal of that Act. That includes the issuing a licence authorising the holder to do building work that involves the removal or ***handling*** of ***asbestos*** is included in the matters to which the clause applies. It defines the meaning of certain terms uses in the clause —

asbestos—see the *Building Act 1972*, section 5 (1).

handling of asbestos—see the *Building Act 1972*, section 5 (4).

In the *Building Act 1972* handing, removing or disturbing certain asbestos containing things in doing building work is taken to be ***building work*** for that Act, requiring a certain kind of builder's licence under that Act.

The clause also provides that unless it expires earlier, it expires on the day, after the commencement of the Bill, that a Territory law is made about asbestos. An intention is to facilitate the expiration of the provisions relating to asbestos in the Bill when and if another Territory law is made about asbestos, as it is anticipated that another such law (a Dangerous Substances Act) may commence within 2 years after the commencement of the Bill.

Clause 177, subclause (1) explains that **t**he provisions set out in schedule 1 to the Bill are taken, on the commencement of the clause, to be regulations made under the Bill, clause 151 (Regulation-making power). Schedule 1's provisions are the draft Building Regulations 2003. Subclause (2) explains that to remove any doubt and without limiting subsection (1), the provisions set out in schedule 1 may be amended or repealed as if they had been made as regulations by the Executive under this Act, section 151. Subclause (3) explains that to remove any doubt, the regulations mentioned in subsection (1) are taken—to have been notified under the Legislation Act on the day the Building Act 2003 is notified; and to have commenced on commencement day; and not to be required to be presented to the Legislative Assembly under the Legislation Act, section 64 (1). The clause also stipulates that subclauses (1), (2) and (3) are laws to which the Legislation Act, section 88 (Repeal does not end effect of transitional laws etc) applies. The clause stipulates that it expires on the day it commences.

Clause 178, subclause (1) explains that **t**he provisions set out in schedule 2 to the Bill are taken, on the commencement of the clause, to be regulations made under the Bill, clause 151 (Regulation-making power). Schedule 2's provisions are the draft Building (Bushfire Emergency) Regulations 2003. The subclause (2) explains that to remove any doubt and without limiting subsection (1), the provisions set out in schedule 2 may be amended or repealed as if they had been made as regulations by the Executive under this Act, section 151. Subclause (3) explains that to remove any doubt, the regulations mentioned in subsection (1) are

taken—to have been notified under the Legislation Act on the day the Building Act 2003 is notified; and to have commenced on commencement day; and not to be required to be presented to the Legislative Assembly under the Legislation Act, section 64 (1).

The clause also stipulates that subclauses (1), (2) and (3) are laws to which the Legislation Act, section 88 (Repeal does not end effect of transitional laws etc) applies. The clause stipulates that it expires on commencement day.

Clauses 179 and **180** deal with administrative matters for part 11. Clause **179** entitles the regulations to modify the operation of this part to make provision in relation to any matter that is not, or is not in the Executive's opinion adequately, dealt with in part 11. Clause **180** makes all of part 11 expire expires 2 years after commencement day. It is anticipated that after that period the provisions of part 11 ought to have become redundant apart from its provisions that continue despite expiration.

Part 12 Repeals

Part 12 repeals laws that the Bill makes redundant, including the *Building Act 1972*. However clause **176** provides to the effect that provisions in that Act that relate to asbestos continue to apply despite repeal of that Act, for a certain period, as the Bill does not make those provisions redundant.

Clause **181** provides for the repeal of the legislation it lists—

• *Building Act 1972* A1972-26; and

• *Building (Bushfire Emergency) Regulations 2003* SL2003-5; and

• *Building Regulations* 1972 SL1972-8.

Schedule 1 — New Building Regulations

Outline

The Building Regulations 2003 ("the regulations") contain much of the administrative requirements for the effective operation of the Bill.

The Building Bill 2003 ("the Bill") replaces the *Building Act 1972* and Building Regulations 1972 regulations ("the superseded building legislation") in conjunction with the Construction Occupations (Licensing) Bill 2003 ("the new licensing scheme").

That bill sets up a single system of licensing for the construction occupations of builders, building surveyors (certifiers), drainers, electricians, gasfitters, plumbers and plumbing plan certifiers. The Bill omits licensing provisions made superfluous

by the new licensing scheme and modernises many of the remaining provisions of the superseded building legislation.

The regulations replace the *Building Regulations 1972*.

Overview of provisions

The key provisions of the Building Regulation 2003 cover:

- descriptions of the kinds of buildings and building work that the Building Bill 2003 does not apply to, entirely or partly
- criteria for the appointment of government certifiers
- requirements for certain plans and plan approvals and amendments
- criteria to assist in considering if work is done in proper and skilful way
- descriptions of mandatory inspection stages for building work
- particulars of administrative matters relating to the completion of building work, insurances, and decisions subject to review.

The provisions of the *Building Regulation 1972* are catered for in the provisions of the Building Regulations 2003, other than builder licensing provisions and other minor provisions that have become redundant.

Details

Regulation 1 provides for the title of the regulations. **Regulation 2** states that the dictionary at the end of the regulations is a part of the regulations. It has 2 notes about the application of the dictionary. **Regulation 3** explains that the "notes" that appear in the regulations are aids to interpretation but not part of the regulations.

Regulation 4 explains that provisions in other legislation apply to offences committed under the regulations. The notes in the Regulation refer to the application of the *Criminal Code* and penalty units under the *Legislation Act 2001* to the regulations.

Regulation 5 lists descriptions of buildings that are ***exempt buildings*** for the purposes of clause 12 of the Bill. ***Exempt buildings*** are exempted from the application of Parts of the Bill dealing with approvals and certification of work. ***Exempt buildings*** are either comparatively small buildings or structures of not significant structural complexity or certain temporary buildings or structures. The cost and efficiency benefits gained from deregulation the construction of exempt buildings outweigh the justification for regulating their construction. Examples of ***exempt buildings*** are certain—fences, walls, retaining walls, outdoor decks,

carports, pergolas, porches, verandas, shelters, gazebos, shade structures, hail protection structures, sheds, greenhouses, conservatories, cubbyhouses, stores, workshops, studios, outbuildings, class 10a buildings antenna or aerial ***assemblies***, artificial pools, internal alterations to certain buildings, outdoor ponds, small structures, amusement rides or water tanks. The regulation describes certain dimensional tolerances and other matters that specified aspects of those buildings or structures or building work need to be within in order to qualify as ***exempt buildings***. In the case of alterations to certain buildings, the regulations place limitations on the exemption with respect to structural sufficiency, fire ratings, fire escape, fire protection, light and ventilation. For the term ***antenna or aerial assemblies*** it explains that an ***assembly*** includes the antenna or aerial and its mast, tower and footing.

Regulation 6 lists descriptions of buildings and structures that the Act does not apply to by virtue of clause 13 (2) of the Bill. They comprise urban and municipal infrastructure which is generally constructed using engineering practices considered sufficient to not warrant regulating their construction under the Act, particularly considering they are mainly constructed by, or for, government or utilities regulated by government. Also the cost and efficiency benefits gained from deregulation their construction outweighs the justification for regulation their construction. They include bridges, dams, retaining walls associated with bridges, dams or roads, stiles, mesh fences less than 3m high, prefabricated bus shelters, prefabricated playground equipment, road signs, electricity network distribution equipment, reservoirs that are not part of an on-site stormwater detention system, aqueducts, water and sewage treatment works, stormwater outfalls and certain poles and masts.

Regulation 7 lists descriptions of building work that are ***exempt building*** work for the purposes of clauses 15 (b) and 83 (b)of the Bill. ***Exempt building work*** is exempted from the application of parts part 3 (Building work) and part 6 (Residential buildings—statutory warranties, insurance and fidelity certificates). Those parts of the Bill mainly relate to plans, approval, inspection, certification and insurance of building work. Exempt building work includes certain kinds of installation, alteration or removal of certain externally mounted photovoltaic panels or solar water heaters and certain externally mounted air conditioning units. The regulation sets out various circumstances that must exist for the exemption to operate. The cost and efficiency benefits gained from deregulation of doing ***exempt building work*** outweighs the justification for regulating it.

Regulation 8 sets out the criteria for the appointment of a government certifier for building work—

(a) a building approval for the work is in force; and

(b) a licensed builder has started the work; and

(c) the owner of the land where the work is being carried out cannot, after making reasonable efforts, appoint a certifier for the work.

Subclause 20 (4) of the Bill refers to the criteria . The intention is that the government certifier provides a safety net that can provide the certification services that are unreasonably difficult or impossible to obtain from the private sector. An effect of the criteria is that a person cannot choose to use a government certifier's services unless the person practically has no other option. Therefore there will effectively be no commercial competition between government certifiers and certifiers in the private sector.

Regulation 9 prescribes that the number of copies of plans required for a building approval application, as referred to in clause 26 (2) (a) of the Bill, is three copies of the plans. The intention is that the certifier keep one copy, one copy is required to be given to the construction occupations registrar and one copy is required to be given to the applicant for the plan approval. The certifier is entitled to require extra copies in certain circumstances where extra copies are required for certain consultations.

Regulation 10 prescribes the general requirements for applications for building approval, as referred to in clause 26 (3) of the Bill. It requires certain cost estimates, safety precautions and the area of the respective land parcel to be stated in the application. The cost estimate is used as a basis for determining fees that are required as part of the plan approval requirements under the Act. The regulation provides that construction occupations registrar determines the method for calculating that cost, and that such a determination is a notifiable instrument. That determination is necessary to establish a consistent method of cost calculation and reduce incidence of fee evasion. The safety information is particularly relevant for dangerous aspects of the work such as demolition. Demolition, including demolition by explosion or implosion, is included under the definition of building work in the Bill and is therefore regulated by it. It is intended that the required safety information include particulars of things like hoardings to protect footpath traffic, security fencing, barricades and road traffic management plans where applicable to the work. The land area is used for statistical purposes.

Regulation 11 prescribes certain specific requirements for applications for building approval in relation to the erection or alteration of a building, as referred to in the Act, s 26 (3). It requires certain information to be given in the application in certain circumstances including—the building class, type of fire-resisting construction and site classification, all as set out in the Building Code of Australia, the materials used, the number of storeys, the number of new dwellings (if any) created by the building work, and relevant floor areas. They also include, if a performance requirement of the building code is to be complied with by use of an alternative solution under the code—the performance requirement, and the alternative solution, and each assessment method used to show that the alternative solution complies with the performance requirement. They further include, if the building code does not state a standard of work in relation to any part of the proposed building work and it is intended to carry out that part of the proposed building work in accordance with a standard of work stated in another document—

(i) the nature of the proposed building work; and

(ii) the title of the document; and

(iii) each assessment method used to show that the proposed building work complies with the standard of work stated in the document.

Most of that information is used in determining if the application complies with technical standards, such as the Building Code of Australia. Some is used for statistical purposes.

The term ***alternative solution*** is defined in the Building Code of Australia. Regulation **11** refers to the code to define the meanings of the terms ***assessment method*** and ***performance requirement*** for that regulation.

Regulation 12 prescribes requirements for applications for building approval in relation to the removal or demolition of a building, as referred to in clause 26 (3) of the Bill. Demolition, including demolition by explosion or implosion is included under the definition of building work in the Bill and is therefore regulated by it. Regulation 13 requires certain information to be given in the application in certain circumstances including details of the methods to be used in the execution of the building work including a work plan as stated or set out in Australian Standard 2601 (which deals with demolition) as in force on the commencement of the regulation, and the number of dwellings demolished (if any). The information is relevant to determining how the work is to be done and site inspection requirements during the demolition, and the information about dwelling numbers is used for statistical purposes.

Regulation 13 prescribes general requirements for plans that accompany applications for a building approval, as referred to in clause 27 (1) (a) of the Bill. It requires plans, in certain circumstances, to-

- be drawn to Australian Standard 1100 (which deals with plan drawing);
- show easements;
- show certain pipe connections in relation to storm water, sewer, or water supply and land surface grading, where relevant to the proposed work;
- include a site plan on a scale of not less than 1:200 showing the block, section, boundaries and dimensions of the parcel of land.

The information is required to determine if the work will comply with required standards and the building code, enable the building work to be built to the plan, and to enable a certifier to determine if the work as built complies with the Act, the plan, relevant standards and the building code.

Regulation 13 also defines the meaning of some terms used in that regulation.

Regulation 14 prescribes requirements for plans that accompany applications for

building approval in relation to the erection or alteration of a building, as referred to in clause 27 (1) (a) of the Bill. It Plans that relate to the erection or alteration of a building must contain sufficient information about the proposed finished dimensions, arrangement, locations and inherent characteristic of materials making up every element of the proposed building work—

(a) to allow a certifier to work out if a building erected or altered in accordance with the plan would contravene the Bill; and

(b) to allow a competent builder to carry out the building work in accordance with the plans and the Bill; and

(c) to allow a certifier to work out if the building work, if carried out, complies with the plan and the Bill.

It further requires that information required to be shown on the plans must be consistent with AS 1100 (which is about technical drawing) and must be apparent from reading the drawing, rather than having to take measurements from the drawing.

However, the regulation provides some dispensation in relation the requirement to provide details about certain things. The cost and time needed to document such specific information about every part of a building are difficult to justify in terms of the benefits gained from requiring such detailed documentation, particularly considering the computer aided design and manufacture techniques used in fabricating house framing. The dispensation applies to certain walls, partitions, floors, or roofs, masonry, and concrete elements. The regulation prescribes the level of information that is required in respect of things covered by the dispensation. It provides an example on how an aspect of the dispensation can apply. Regulation 15 indicates that plans may contain other information than that prescribed.

Regulation 15 describes a list of consultations and consents that the Act requires take place before a plan approval can be given. They are referred to in clause 27 (1) (b) of the Bill. A number of areas of the ACT Government and some outside it have interests in aspects of construction or administer legislation affecting aspects of it. The provisions for consultation and approval in regulation 16 maintain the link between planning and building and continue other relevant arrangements that were in place under the former building regulations. The prescribed list includes-

(a) any consent or approval required under a Territory law in relation to the work;

(b) if the work is, or forms part of, a development requiring approval under the *Land (Planning and Environment) Act 1991*, part 6.2—approval of the development;

(c) if the approval mentioned in paragraph (b) contains conditions precedent to starting the building work—compliance with those conditions;

(d) if the parcel of land is in a ***designated area***—approval under the *Australian Capital Territory (Planning and Land Management) Act 1988* (Commonwealth), section 12;

(e) if the work involves the erection or alteration of a lift—a permit under the Scaffolding and Lifts Regulations 1950, regulation 17;

(f) consultation with ACTEW Corporation Limited in relation to—

(i) the demolition of any building to which electricity, water or sewerage services are supplied or to which an electricity or water meter is connected; and

(ii) any encroachment of the proposed building or proposed new part of the building onto an easement; and

(iii) the disposal of any non-domestic waste into the sewerage system;

(g) consultation with the fire commissioner and the chief fire control officer in relation to—

(i) any use of an alternative solution in relation to a provision of the building code which deals with fire protection; and

(ii) any proposed building or proposed new part of a building, as the case requires, with a floor area exceeding 500m2 that is not a class 1 or class 10 building;

(h) consultation with the chief executive responsible for urban services in relation to—

(i) procedures to be used in the demolition of any building of class 2, class 3, class 4, class 5, class 6, class 7, class 8 or class 9; and

(ii) any waste management plan provided in the application;

(i) if it is proposed that the new building or new part of the building is to be used for the sale or supply of liquor—consultation with the construction occupations registrar of liquor licences in relation to occupancy loading and kitchen, bar and toilet facilities;

(j) consultation with the chief health officer in relation to the application of any ***health law*** to the proposed new building or new part of the building;

(k) consultation with the environment protection authority if—

(i) it is proposed that the new building or new part of the building is to be used to conduct a ***class A*** or ***class B*** activity; or

(ii) an ***accredited code*** of practice is applicable to an activity intended to be carried out in the new building or new part of the building.

Regulation 15 also limits the period for response to consultation to 10 working days. There is no time limit prescribed for where agreement is required. It defines the meaning of some terms used-

accredited code of practice means a code accredited under the *Environment Protection Act 1997*, section 31 (1).

class A activity means an activity listed in the *Environment Protection Act 1997*, schedule 1, clause 2.

class B activity means an activity listed in the *Environment Protection Act 1997*, schedule 1, clause 3.

designated area—see the *Australian Capital Territory (Planning and Land Management) Act 1988* (Commonwealth).

health law means a Territory law that has as one of its objects or purposes the protection of public health.

Regulation 16 contains criteria to be used to determine if plans are for the ***substantial alteration*** of a building, as referred to in clause 29 (2) of the Bill. An intention is that if the volume of the proposed building work when added to that of certain building work carried out on the same building in the past three years comprises more than 50% of the volume of the building, then the plans ought to also reflect any work required to ensure the entire building will meet current requirements of the Act (and not just the originally proposed work). The anticipated outcome is that in the long term many old buildings will be upgraded to better keep pace with changes in building code requirements. The regulation provides that an alteration of a building is a substantial alteration if—

(a) the aggregate volume of the proposed alteration and any other alteration made to the building during the 3 years immediately before the day the application for building approval of the alteration is made is more than 50% of the volume of the original building; and

(b) the volume of a building is measured by reference to roof and outer walls.

Regulation 16 also gives five examples of the effect of those provisions to endeavour to illustrate the intent of the regulation—

1 A house is extended by 70%. The whole building must comply with this Act, not just the extension (see par (a)).

2 A sunroom is added to a building, adding only 10% to the building. The sunroom must comply with this Act, not the rest of the building (see par (b)).

3 Two shops in a mall are to be combined to form a café. The building work involves replacing all the shops' fitout, including all fixtures, the glazed shopfront walling and ceiling and removal of the common wall. In the three years immediately before the date the application for building approval is

made, other shops in the mall have been altered similarly. The total volume of the refitted shops, with the volume of the café, is more 50% of the volume of the mall. The whole mall must comply with this Act, not just the café.

4 A photocopier room is to be added to an office building. In the three years immediately before the date the application for building approval is made the building has often had parts of its fitout altered. Open plan cubical work stations were moved, enclosed meeting rooms were converted to open plan cubical workstations, three walls of another enclosed office were moved to make a hallway and new enclosed offices were created where open plan cubical workstations originally were located. The first alterations to the cubical workstations did not involve altering or erecting fixtures, so the alterations do not need to be included when working out the total volume of alterations to the building. The cubicle work stations erected in place of the enclosed meeting rooms were fixtures, so the volume of each workstation, worked out by multiplying its usable floor area by the height of the floor or roof above, must be included in working out to the total volume of alterations to the building. The removal of the three walls of the enclosed office to make a hallway prevent the room functioning as a room, so the volume of the room must be included in working out the total volume of the alterations to the building. The walls erected to form a room or substantially enclosed space must be included to work out the total volume of the alterations to the building. However, the total of the volumes of the alterations made to the building, when added to the volume of the proposed photocopier room, amount to 45% of the building, so only the proposed room has to comply with this Act, not the whole building.

5 A building contains a nightclub where a fire sprinkler system was installed 1 year ago. Plans now propose to upgrade the airconditioning system throughout the building. The volume of the sprinkler pipework and proposed airconditioning ducts are included in working out the total volume of alterations to the building, but the volume of the spaces they can sprinkle or ventilate is not included.

Regulation 17 sets out criteria, which clause 32 (4) of the Bill requires be used, to determine if a building built to amended plans (the ***new building***) is ***significantly different*** from a building built to the unamended plans (the ***old building***) when considering plans for approval under the Act. An intention is to require that a new building approval be sought, rather than an amendment to an existing approval, where the criteria indicate that the ***old building*** is significantly different to the ***new building***. Without that mechanism, it could be possible to reduce the liability to pay relevant determined fees by exploiting the use of the system of amendments to plan approvals. That is because under the Bill the relevant fees payable are proportional to the value of the building work. So, for example if the ***old building*** is a 1 bedroom house, the fees payable are based on the cost of that house. If the ***new building*** is in respect of an amendment to the plans for that 1 bedroom house to change it to a 10 room motel, then without the regulation 18 provisions

no additional fees would apply despite the cost of the work increasing substantially. The effect of regulation 17 is to allow the 1 bedroom house plan to be amended to the extent that it would not have significant impact on the determined fees payable after the amendment. Such changes could include things like adding a window or door, for example. But if the amendment is to add a second bedroom, the increase in certain dimensions of the house as described in the regulation would prevent the amendment from being treated as an amendment to the relevant plan approval. Instead a new approval ought to be sought for the extra bedroom, thus incurring a liability to pay extra fees in respect of the extra cost of the work, as required by the Bill.

The relevant prescribed criteria which determine that an amendment to a plan results in a significantly different building include-

(a) the floor area, roof area or volume of the new building has increased or decreased by more than 1%; or

(b) the new building is not same class of building as the old building; or

(c) if the old building had parts that are not of the same class of building—

  (i) the position of the parts in the new building has changed; or

  (ii) the floor area, roof area or volume of the parts in the new building has increased or decreased by more than 1%; or

(d) any dimension of the perimeter of the new building, including the perimeter of the building's footprint or an elevation, has changed by more than 1%; or

(e) the type of material to be used in the new building to form a structural element, roof, floor or external wall cladding has changed; or

(f) the number of storeys or buildings in the new building has changed.

Regulation 17 also provides an example to clarify how the change of dimension concept it establishes applies-the height of the building increases from 3m to 3.5m. The change of the dimension is more than 1%.

Regulation 18 prescribes criteria, which clause 42 (2) of the Bill requires be taken into account, in considering if building work has been done in a proper way. The Bill requires building work to be done in a proper and skilful way. The prescribed criteria include-

(a) whether the work uses a product or system in accordance with any accessible instructions, directions, guidelines or suggestions of the maker or seller of the product or system;

  (Examples of instructions that are not accessible are- 1) instructions not in English; 2) an information leaflet printed 10 years ago that is now unavailable).

(b) whether the work is in accordance with any relevant rules or guidelines published by Standards Australia;

(c) whether, as part of the work, a product or system is being, or has been, used in a way that a reasonable person would expect is contrary to the intended use of the product or system;

(d) whether, as part of the work, a product or system is being, or has been, used in a way that the maker has given written notice will void the maker's warranty;

(e) whether a reasonable person doing the work would know or reasonably suspect that the use of a product or system in a particular way would cause more instability, or affect the durability or soundness of the product or system or of the building work than if the product or system were used appropriately;

(f) how reasonable it is in all the circumstances for the user of a product or system to rely on the maker's statement that the product or system complies with a stated standard;

(g) whether the building work contravenes the Bill or another Territory law.

An example of the intended application of paragraph (a) is where the manufacturer of a lintel provided tables specifying the maximum distanced that the lintel can span in a given situation. The tables may be taken as being manufacture's guidelines for the purposes of paragraph (a). If building work involved the installation of a lintel that spans further than that respective maximum distance in the relevant circumstances, then under paragraph (a) that work may be taken to have been done not in a proper way.

It is intended that paragraph (b) applies in respect of any Australian Standard that is applicable to doing the building work. For example, if an Australian Standard set out acceptable tolerances for the erection of roof trusses then paragraph (b) applies in respect of those tolerances where relevant building work involved the erection of roof trusses covered by that standard. It is intended that that apply despite the fact that the building code may, or may not, refer to the Australian Standard.

An example of the intended application of paragraph (c) is where an untreated, low-durability timber wall stud is buried in the ground and used as a long-term structural support for a deck. If it is established that a reasonable person would expect such use of a wall stud to be contrary to the intended use of that product in that it would rot in the ground, then paragraph (c) applies to that use in the building work.

Regulation 18 also provides an example of the application of paragraph (d)- Installing roof sheeting so it is level at any point is use in a way that a reasonable person would expect to be contrary to the intended use of the sheeting if the manufacturer's published literature indicates that the sheet's warranty is voided

ifthe sheeting is installed at a fall of less than 1° off level.

An example of the intended application of paragraph (e) is where plain steel fasteners, such as nails and bolts, were used to hold beams and columns of an external timber pergola together. If it is established that a reasonable person would suspect that the pergola may eventually become unstable due to rusting of the plain steel fasteners, then paragraph (e) applies to their use in the building work.

An example of the intended application of paragraph (f) is where the maker of a container of steel bolts indicated that the bolts are zinc plated and that plating complies with a stated standard. If a person used the nails suspecting that the statement was wrong in that the bolts were clearly of plain steel with no zinc coating (and therefore subject to rapid rusting), then paragraph (f) may apply to the way the person relied on the statement and used the bolts in the building work in a situation where plain steel bolts were inappropriate due to rusting.

An example of the intended application of paragraph (g) is where a person does building work that does not comply with the building code in circumstances where the Bill required such work to so comply.

Regulation 19 prescribes the criterion, which clause 42 (2) of the Bill requires be taken into account in considering if building work has been done in a skilful way. The Bill requires building work to be done in a proper and skilful way. The prescribed criterion includes-

in deciding whether building work has been done in a skilful way, consideration must be taken of whether the work has been carried out to completion with enough care that it does not have to be redone to adequately serve its intended purpose or comply with the Act.

It provides examples to illustrate application of the criterion-

1 A timber stairway was built. Its elements were glued and nailed together permanently. The top step was too high to comply with a relevant provision of the building code. The step had to be disassembled or removed to rectify that noncompliance. The building of the step was not done in a skilful way.

2 The potential non-compliance in the step mentioned in example 1 was noticed before the components of the step were permanently fastened together. It was adjusted to ensure it complied with the building code without having to undo or redo any completed building work. That noncompliance and adjustment do not indicate that the building of the stair was not done in a skilful way.

It is intended that in applying the criterion consideration ought to be given to the extent to which defective building work must be undone and redone to achieve compliance with the requirements of the Act. It recognises that there is likely to be a level of error making while carrying out building work that ought not necessarily

be captured by the criterion. However it is intended that a failure to put in place reasonable, adequate and effective measures to minimise, detect and rectify such errors ought to result in the paragraph applying, particularly where earlier detection of the errors, or exercising more care in doing the work, would have reduced the amount of rework necessary to bring resulting non-compliance into compliance.

Regulation 20 describes how much building work can be done to constitute the building work having reached various stages. The stages are referred to in clause 43 (1) of the Bill. The stages are consistent with the stages that were previously prescribed in the *Building Regulations 1972*. The Act prohibits building work from continuing past a stage unless the work had been inspected and passed by a certifier and the certifier had given permission for the work to proceed. The stages are set at points during construction where critical aspects of the work can be seen before being covered over with concrete or wall linings for example. The stages include-

(a) completion of excavation, placement of formwork and placement of steel reinforcing for the footings before any concrete for the footings is poured;

(b) completion of the structural framework and, for a class 1 or class 10 building, before the placement of any internal lining; and

(c) for a class 1 or class 10 building—completion of placement of formwork, and placement of steel reinforcing, for any reinforced concrete member before any concrete for the member is poured; and

(d) for a building other than a class 1 or class 10 building—completion of any reinforced concrete member, before any concrete for the member is poured, stated by the certifier in the relevant building approval; and

(e) completion of the building work approved in the relevant building approval.

The regulation includes a note-"the Act, s 43 (2) requires certain things to be done before building work proceeds beyond the dampcourse level of a building." That is in addition to the stage requirements of regulation 21.

The class 1 and class 10 buildings referred to in regulation 21 are residential buildings that are not blocks of flats, as classified by the building code.

Regulation 21 prescribes the criteria that a plan must satisfy to be prescribed for the purposes of clause 43 (2) (a) (ii) of the Bill. It also describes the circumstances under which the regulation applies. An intention is to provide a degree of dispensation in certain circumstances where the Bill requires a plan signed by a registered surveyor (a survey plan). When most buildings are constructed, before proceeding with construction above the building's damp course level the Bill requires the relevant certifier to be given a survey plan for the work and for that certifier to be satisfied the building is located at the required position and that its floors are at the required level. An intention is to detect wrongly positioned building footings and floors before construction becomes more

advanced. The requirement has applied in relevant previous laws for several decades. Most buildings therefore have a survey plan in existence that was created at the early stages of their construction. The provisions of regulation 21 recognise that such survey plans can serve a similar purpose as a new survey plan can in respect of certain additions to a building. The Bill requires that a new survey plan be made for all new building work that has a damp course, subject to the dispensation of regulation 21. Most habitable residential buildings do have a damp course. In practice creation of the required survey plan entails a registered land surveyor measuring the building work and boundaries of the land and depicting the measurements in the survey plan. That process can take significant time and has a significant cost. The regulation 21 dispensation provides that the certifier can use certain old survey plans to check the position on new building work, rather than require a new survey plan. An example is where an old survey plan for a house states that the house is located at a distance of 6 m from its side boundary, and that the house is parallel to that boundary, and the boundary is straight. In circumstances where an extension of the house is to be constructed at the same 6 m distance from the same boundary, and also parallel to it, then under regulation 21 the certifier is entitled to rely on the old survey plan rather than require a new survey plan in checking the position of the new extension. That is subject to the provisions of that regulation which include-

The regulation applies to building work if—

(a) the work is only in relation to an extension or alteration of an existing class 1 or class 10 building (the ***original building***); and

(b) any building resulting from the work is to be located completely on the same parcel of land (the ***original land***) where the original building is.

A plan (the ***original survey plan***) signed by a registered survey is prescribed in relation to building work if—

(a) the ***original survey plan*** contains sufficient information to allow the certifier to form an accurate opinion about whether the building work complies with the Act, section 43 (2) (b); and

(b) the arrangement of the boundaries of the original land, and location and levels of the original building, have not changed since the original survey plan was made; and

(c) no building on which the work is to be carried out is, or building resulting from the work is to be, situated closer than 100mm away from boundary of the parcel of land.

Regulation 22 describes a list of approvals that the Bill requires be obtained when a certifier believes that building work appears complete, as part of the building approval process. They are referred to in clause 48 (2) (d) of the Bill. A number of areas of the ACT Government have interests in aspects of construction or

administer legislation affecting aspects of it. The provisions for approvals in regulation 23 maintain the link between planning and building and continue other relevant arrangements that were in place under the former building regulations. The prescribed list includes-

(a) if an approval for building work given under the Land (Planning and Environment) Act 1991 is subject to a condition—the approval of the chief planning executive to the way in which the condition has been satisfied;

(b) approval of the installation of any fire appliance in the new building or new part of the building by the fire commissioner or other person authorised under the Fire Brigade Regulations 1958, regulation 3 (2);

(c) approval under the Scaffolding and Lifts Regulations 1950, regulation 21.

Regulation 23 prescribes that the cost of residential building work as referred to in clause 87 (1) (c) of the Bill is $12 000. The intention of that provision is that part 6 of the Bill does not apply to residential building work that costs less than $12 000. That part 6 deals with building warranty insurance.

Regulation 24 prescribes that the period that needs to elapse before a statutory warranty ends as referred to in clause 88 (4) of the Bill is 6 years or 2 years after the ***completion day*** (as defined in clause 88 (4) of the Bill) for the work. The 6-year period applies for residential building work in relation to a ***structural element*** and that the 2-year period applies for residential building work in relation to a ***non-structural element***. The regulation defines the term ***non-structural element*** of a building to mean a component of the building that is not a ***structural element***. It defines the term ***structural element*** of building to mean an internal or external load-bearing component of the building that is essential to the stability of the building (a foundation, floor, wall, roof, column or beam) or to mean any part of it or any component (including weatherproofing) forming part of the external walls or roof of the building.

An intention in limiting the duration of statutory warranties is to balance the conflicting objectives of providing consumer protection whilst maintaining builder's and insurers liabilities at viable levels.

Regulation 25 prescribes that the maximum amount that insurance referred to in the Bill, subclause 90 (b) must provide insurance cover of, (or an amount equal to the cost of the work, whichever is less), is $85 000. An intention in limiting the amount of required insurance cover to a maximum of $85 000 is to balance the conflicting objectives of providing consumer protection whilst maintaining builder's and insurers liabilities at viable levels.

Regulations 26 to 27 prescribe things, which the Bill, clause 90 relies on in setting out compliant insurance criteria. Set out below is some of the text of clause 90 of the Act with the respective prescribed things inserted and emphasised, to clarify the intention of the clause and regulations 26 to 28.

"An insurance policy issued in relation to residential building work complies with this section if—

(a) it is issued by an authorised insurer; and

(b) it provides for a total amount of insurance cover of at least the amount prescribed under the regulations [**$85 000 (see regulation 25)**], or an amount equal to the cost of the work, whichever is less, in relation to each dwelling that forms part of the work; and

(c) if the builder is not the owner of the land where the work is to be carried out—it insures the owner and the owner's successors in title for the period beginning on the day the certifier in relation to the work receives a notification under section 37 in relation to the builder and ending at the end of the period prescribed under the regulations [**5 years (see regulation 26)**] after the day a certificate of occupancy is issued for the work; and

(d) if the builder is the owner of the land where the work is to be carried out—it insures the builder's successors in title for the period beginning on the day the title in the land is transferred to another person and ending at the end of the period prescribed under the regulations [**5 years (see regulation 26)**] after the day a certificate of occupancy is issued for the work; and

(e) the whole of the premium payable in relation to the period has been paid; and

(f) it insures the owner (if the builder is not the owner) and the owner's successors in title against the risk of being unable to enforce or recover under the contract under which the work has been, is being or is to be carried out because of the insolvency, disappearance or death of the builder; and

(g) it insures the owner (if the builder is not the owner) and the owner's successors in title against the risk of loss resulting from a breach of a statutory warranty; and

(h) it insures the owner (if the owner is not the builder) and the owner's successors in title against the risk of loss resulting, because of the builder's negligence, from subsidence of the land; and

(i) it provides that a claim under it may only be made within the period prescribed under the regulations [**90 days (see regulation 27)**], or a longer stated period after the claimant becomes aware of the existence of grounds for the claim; and

(j) the form of the policy has been approved in writing by the construction occupations registrar."

Regulations 28 prescribes an amount, which the Bill, clause 91 (1) relies on. Set out below is some of the text of clause 91 (1) of the Bill with the prescribed amount, $500, inserted and emphasised, to clarify the intention of clause 91 (1)

and regulation 29.

"A compliant residential building insurance policy may provide that the authorised insurer who issues the policy is not liable for the 1st amount equal to the amount prescribed under the regulations [**$500**], or the stated lesser amount, of each claim."

Regulations 29 prescribes an amount, which clause 93 (3) (b) of the Bill, relies on. Set out below is some of the text of clause 90 (3) (b) of the Bill with the respective prescribed amount, $10 000, inserted and emphasised, to clarify the intention of clause 93 (3) (b) and regulation 30.

"However, if the owner has paid a deposit on the work and the cost of any work done is less than the amount of the deposit, the owner may recover from the insurer the lesser of the following amounts:

(a) an amount equal to the amount of the deposit less the cost of any work done;

(b) the amount prescribed under the regulations [**$10 000**] less the cost of any work done."

Regulation 30 prescribes a list of certain kinds of decisions that the construction occupations registrar is entitled to make under the Bill and a corresponding list of certain people (***relevant people***) that clause 144 (5) of the Bill requires notices under that clause to be given to if the clause applies. It relates to appeal rights in respect of the decisions, and notices of those appeal rights.

The **dictionary** at the end of the regulations is provided for in regulation 3 and gives definitions of terms used in the regulations.

Schedule 2—New Building (Bushfire Emergency) Regulations

Outline

The Building (Bushfire Emergency) Regulations ("new") replace the regulations ("old") made under the *Building Act 1972*, which performed the same function as the as the new. The old regulations are also entitled the Building (Bushfire Emergency) Regulations.

The new regulation's provisions are virtually identical to the old, but refer to the Construction Occupations (Licensing) Bill 2003 rather the *Building Act 1972* where appropriate.

The new regulations apply to buildings and structures affected by the bushfires of January 2003 and provide for them to be demolished under a modified procedure.

The new regulations work in combination with the Land (Planning and Environment) (Bushfire Emergency) Regulations 2003 ("the Land Bushfire Emergency

Regulations"). Normally a development application and then building approval are both required for demolition. The two sets of regulations reduce these to one process.

The Land Bushfire Emergency Regulations provide for the identification of the land where buildings and structures were destroyed by bushfires, identify the period of the bushfires and exempt demolition on that land from approval as a development under the Land (Planning and Environment) Act under certain conditions.

One of the conditions is that a plan of works is drawn up for the demolition and the development complies with an agreement between the owner and the person carrying out the demolition that has been approved by the construction occupations registrar.

The Bill defines building work to include demolition, describes building approval (including a statement of what plans must be provided with an application to carry out demolition) and states which the kinds of people (certifiers) who may provide building approval.

The new regulations modify those requirements by providing that an endorsed plan of works that satisfies the Land Bushfire Emergency Regulations also satisfies the building approval requirements of the Bill.

Details

Regulation 1 is a formal regulation that gives the name of the regulations.

Regulation 3 is a formal regulation that indicates that the effect of notes included in the regulations is limited to explanatory purposes.

Regulation 4 states that if there is an endorsed plan of works for a building exempted from development approval under the Land (Planning and Environment) (Bushfire Emergency) Regulations 2003, then the corresponding building work is taken to be approved.

The Bill—Dictionary

The **dictionary** at the end of the Bill is provided for in clause 3 of the Bill and gives definitions of terms used in the regulations.

Cost implications

Nil.