

1992

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

BUILDING (AMENDMENT) BILL 1992

EXPLANATORY MEMORANDUM

Circulated by Authority of the Minister for Urban Services

Terry Connolly MLA

BUILDING (AMENDMENT) BILL 1992

The Building Act:

The *Building Act 1972* (the "Principal Act") regulates building activities in the Territory. As part of this regulation all building work must have approved plans, be carried out under a building permit and be inspected by building inspectors for safety and structural soundness.

An owner who proposes to do any building work is required to submit plans of the building work for the Building Controller to approve. The builder then must obtain a building permit to carry out the proposed building work from the Building Controller. In the building permit the Building Controller may specify the stages during the course of the building work at which the work is to be inspected. All of these requirements are contained in Part III of the Principal Act.

Once the building work is complete it is inspected again before a certificate of occupancy and use is granted by the Building Controller under Part V of the Principal Act.

Minor building work involving buildings such as pergolas, carports, small retaining walls, timber decks and courtyard walls does not pose a significant safety risk. Inspection of these types of structures involves a cost, to both the government and to the land owner building the structure, that is out of proportion to the benefits gained from that approval and inspection system.

Main features of the Amending Bill:

The Building (Amendment) Bill 1992 (the "Amending Bill") amends the Principal Act so that minor building work is no longer subject to the full approval, building permit and inspection process (new subsection 6AA(1) and (2) inserted by clause 5). That is, these minor building works are "prescribed buildings" to which Part III and Part V of the Principal Act no longer apply. Regulations will be prepared following the passage of this Amending Bill setting out the circumstances in which buildings will be classified as "prescribed buildings".

Prescribed buildings are also excluded from the provisions of Part VA of the Act if they are built after the commencement of these amendments (new subsection 6AA(1) inserted by clause 5). Part VA of the Act sets out requirements as to statutory warranties and insurance for residential building work. Prescribed buildings are excluded from this Part because the high standards that result from the controls in Parts III and V of the Act cannot be guaranteed where these controls are no longer exercised. This in no way detracts from the rights that an owner has against a builder other than under statute.

Existing buildings which, if they had been built after the commencement of this Bill would have come within the definition of "prescribed building", are also exempted from Part III and Part V of the Principal Act (new subsections 6AA(3) and (4) inserted by clause 5). This has been done for a number of reasons.

- Firstly, there are large numbers of existing unapproved buildings in the Territory which would fall within the prescribed building category. Where there is a change in the ownership of land these unapproved buildings are identified during the conveyancing process. The unapproved buildings are then either approved retrospectively before transfer of the title or the selling price is adjusted to take account of the presence of the building. The retrospective approval process is a rather fictitious one as it involves the submission of plans for approval and the issue of a building permit to "build" a building which is already in existence.
- Secondly, it would, in time, become very difficult to ascertain whether a building, which would appear to be a prescribed building, was built before or after the commencement of this Bill. If a building was built before commencement and subsections 6AA(3) and (4) were not included, then the owner of the building would still be liable to a penalty under the provisions of the Principal Act. These subsections pre-empt the difficulties that would be faced by a potential purchaser in this situation.

Consequential amendments - stop notices and orders to do building work:

Section 43 of the Principal Act sets out the circumstances in which the Building Controller may issue a notice to stop building work that is in the process of being carried out. Section 46 of the Principal Act sets out the circumstances in which the Building Controller may issue a notice to direct that building work be done. Both of

these sections continue to apply to building work in respect of prescribed buildings. Subclause 8(b) and subclause 10(c) of the Amending Bill modify the application of these sections so that the grounds for issuing notices that rely on the existence of a building permit or approved plans do not apply in respect of prescribed buildings.

Sections 43 and 46 are also amended by the Bill to allow the Building Controller to issue a notice where a prescribed building is on an easement. "Easement" is defined in new section 42S which is inserted by clause 7 of the Amending Bill. Without the requirement for approved plans in respect of prescribed buildings, and in the absence of any other regulation of easements, it would be extremely difficult for the Building Controller, for example, to issue a notice requiring the owner of a fence that is built across a sewerage easement to move or modify the fence to allow the ACT Electricity and Water Authority access to the easement for maintenance purposes.

Subclauses 8(b) and 10(a) of the Amending Bill respectively insert new paragraphs 43(1)(fa) and 46(1)(ea) to overcome this problem. These new paragraphs allow the Building Controller to issue a notice where building work in respect of a prescribed building is being carried out, or has been carried out, so as to encroach on an easement. This power is not available where plans for the building work were approved before the commencement of this amendment and the building work was carried out in accordance with the plans (new subsections 43(2A) and 46(4B) inserted by subclauses 8(c) and 10(c) respectively of the Amending Bill. This is because any encroachment on an easement that occurred in this situation would have occurred with the approval of the relevant authority.

Sections 44 and 46 are also amended by clause 9 and subclause 10(b) of the Amending Bill so that the Building Controller may only issue a notice on the grounds that the building work has been carried out contrary to the approval of the Territory Planning Authority, or on the grounds that it does not comply with the design and siting requirements of the Territory Planning Authority, at the request of that Authority. This amendment recognises that it is the Territory Planning Authority that initially makes these decisions and should also therefore make decisions on any matters that follow on from that initial decision.

Any decision to issue a notice under section 43 or 46 is able to be reviewed by the Administrative Appeals Tribunal. Authorised by the ACT Parliamentary Counsel—also accessible at www.legislation.act.gov.au

Subsection 6(5) of the Principal Act is repealed by clause 5 of the Amending Bill. Subsection 6(5) excludes small sheds, ornamental ponds, antennae, aerials and above ground swimming pools up to a certain capacity from the application of the Principal Act. This provision is repealed as these structures will be included in the regulations as prescribed buildings, along with other types of structures, in respect of which the Principal Act will have limited application.

Formal matters:

The formal citation and commencement provisions of the Amending Bill are contained in clauses 1, 2 and 3. The Bill has a delayed commencement because of the need for the Executive to make regulations to identify prescribed buildings.

Clause 6 of the Amending Bill makes a formal amendment to section 24 of the Principal Act to correct an incorrect reference to the Australian Uniform Building Regulations Co-ordinating Council.

Clause 11 and the Schedule provide for the amendment of the Principal Act so that sexist language is eliminated. The only term that is not amended by this Bill is "workmanlike" in paragraphs 40(c) and 58C(1)(b) of the Principal Act. The phrase "proper and workmanlike" has a judicially defined meaning and is in wide general use. A change at this time could lead to uncertainty and confusion.

Financial considerations:

The Bill is expected to result in savings in resources and in administrative costs associated with approving and inspecting minor building works.

Authorised by the ACT Parliamentary Counsel—also accessible at www.legislation.act.gov.au