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LEGISLATIVE ASSEMBLY FOR THE AUSTRALIAN CAPITAL TERRITORY

PLANNING AND DEVELOPMENT AMENDMENT BILL 2009 (No 2)

EXPLANATORY STATEMENT

Circulated by authority of
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Minister for Planning

Planning and Development Amendment Bill 2009 (No 2)

Outline

The *Planning and Development Act 2007* (the Act) forms the basis for all development assessment in the Territory and provides the over-arching legislative framework for strategic planning including the Territory Plan; leasehold administration and compliance and enforcement measures in respect to land use.

The Act commenced on 31 March 2008 and introduced, amongst other things, a new way of assessing development applications that matches level of assessment with complexity of the proposed development.

As the Act introduced a new process, implementation has been closely monitored over the last 18 months. Government has been working with the community and industry, through the Industry Monitoring Group and other groups, to ensure that the Act delivers efficiencies and is responsive to identified needs. Since commencement the Act has been amended through the regulations and these amendments have since been regularised, through a formal Act amendment effective on 4 October 2009.

The Planning and Development Amendment Bill 2009 (No 2) (the bill) will further improve the operation of the Act. The bill makes a number of disparate minor amendments for added clarity, information or consistency. For example, the bill inserts a more descriptive definition of a "nominal rent lease" (clause 92).

In addition to these minor changes the bill makes a number of more significant amendments. The key amendments include, for example, the following.

Clause 6 permits quick technical variations to be made to the Territory Plan to improve clarity of language or remove redundant provisions.

Clauses 9, 10, 11, 15 make it clear that a DA for new building does not require re-assessment, revisiting of the existing use of land if that use was already authorised by an existing lease.

Clause 12 makes the default track for lease variations, the merit track (unless development table says otherwise) and confirms that the assessment track for adding a use to a lease is the track that applies to the new use.

Clause 19 makes it clear that a "call in" of a development application does not stop public notification and agency referral steps unless Minister expressly requires this.

Clause 41 prohibits amendments to an already granted DA if the amendment would interfere with a court imposed DA condition.

Clause 72 permits ACTPLA to obtain full data set and updates of lessee contact addresses from ACT Revenue. This will enable ACTPLA to notify development applications and take compliance action more effectively and quickly. This

information will be protected by existing secrecy provisions in the Planning and Development Act.

Clause 77 is a transitional provision to extend the power to make temporary modifications to the Planning and Development Act by regulation. This power will now exist for a five year period from the commencement of the original Act, expiring on 31 March 2013. This is to ensure that the Government has the flexibility to respond quickly to any new issues that may arise as a result of continuing industry and community consultation.

Planning and Development Amendment Bill 2009 (No 2)

Detail

In this Explanatory Statement:

- "the Act" means the *Planning and Development Act 2007*;
- "the Regulation" means the Planning and Development Regulation 2008;
- "the bill" means the Planning and Development Amendment Bill 2009 (No 2) that is the subject of this explanatory statement and which amends both the Act and the Regulation;
- "clause …" or similar is a reference to a provision of the bill;
- "section …" or "existing section …" or similar is a reference to an existing section in the Act unless otherwise indicated;
- "new section …" or similar is a reference to a new section inserted into the Act by the bill whether as an entirely new section or as a substitution of a new section in the place of an existing section; and
- "revised section …" or "modified section …" or similar is a reference to a section of the Act as modified by the bill.

Part 1 — Preliminary

Clause 1 Name of Act

This is a technical clause that names the title of the Act which would be the Planning and Development Amendment Act 2009 (No 2)

Clause 2 Commencement

This clause enables the Act to commence by way of a notice by the Minister after the Act is notified on the Legislation Register. If the Act is not commenced within six months of notification, the provisions of the *Legislation Act 2001* will automatically commence the Act.

Clause 3 Legislation amended-pt 2

States that Part 2 of the Bill (the main part) amends the Act.

Clause 4 Minister's powers in relation to draft plan variations Section 76 (5) and (6)

The clause deletes sections 76(5), (6) and substitutes new sections 76(5), (6), (7). These new sections are to do with the procedure for the making of variations to the Territory Plan. In summary, draft plan variations are publically notified for a period and then forwarded by the Planning and Land Authority to the Minister for consideration and possible approval (refer ss69, 76).

The Minister may either refer the draft plan variation to a Legislative Assembly Committee (s73), approve the variation (s76(3)(a), or return the draft plan variation to the Authority with directions including, for example, directions for further consultation (s76(3)(b)(i))or a direction to withdraw the variation altogether (s76(3)(b)(v)).

New section 76(5) requires the Planning and Land Authority to prepare a written notice of the withdrawal of a draft plan variation as a result of a direction from the Minister under s76(3)(b)(v). This provision makes a requirement that was arguably already implicit in s76(5)(b) more explicit and clear.

New ss76(6), (7) require the notice of withdrawal under new s76(5) to be a notifiable instrument and to be published in a daily newspaper. These requirements are consistent with existing sections 76(5)(b) and 76(6). A notifiable instrument must be posted on the Legislation Register. However, the requirement, in existing s76(6) that the publication of the notice in a daily newspaper occur on the same day or as soon as practicable after the notification of the withdrawal on the Legislation Register under the Legislation Act, is omitted. This is because such a specific coordination requirement is considered to be of little practical benefit. Instead, s151B(2) of the Legislation Act will apply to require the Authority to publish the newspaper notice as soon as possible. This approach is consistent with the publication of notices relating to the commencement of plan variations under s83(3).

Clause 5 Definitions-pt 5.4
Section 86, definition of *limited consultation*

Clause 5 deletes the existing definition of "limited consultation" and substitutes a new definition. This is a technical amendment only which makes no substantive change. The new wording is consistent with the wording of other definitions in s86.

Clause 6 What are technical amendments of territory plan?
Section 87(e)

Clause 6 deletes s87(e) and substitutes new ss87(e),(f),(g). These new sections expand the range of Territory Plan variations that can be made through the technical amendment process set out in Part 5.4. The technical amendment process is much shorter and less complex than the standard Territory Plan variation process set out in Part 5.3. Territory Plan variations made under the technical amendment process are referred to as "technical amendments" (s87). Public consultation (minimum 15 working days (s90(3)) is required for some but not all technical amendments (s88).

Under s26 of the *Australian Capital Territory (Planning and Land Management) Act 1988* (Cwlth), any provision in the Territory Plan that is inconsistent with the National Capital Plan (NCP), and cannot operate concurrently with the NCP, has no effect. Section 87(e) permits technical variations to the Territory Plan to bring the Plan into line with the NCP. This existing power permits quick changes to remove Territory Plan provisions that are inconsistent with the NCP and which are of no effect in any event. Section 87(e) however restricts the scope of this power to variations required "after a change to the [NCP]". This restriction is unwarranted as inconsistent provisions in the Territory Plan are of no effect irrespective of whether they are inconsistent as a result of recent changes to the NCP. New s87(e) permits technical amendments to bring the Territory Plan into line with the National Capital Plan (Commonwealth) irrespective of whether the need for the variation arose out of a recent change to the National Capital Plan.

New s87(f) permits technical amendments to remove obsolete or redundant provisions from the Territory Plan. As the examples in new s87(f) suggest, a provision may

become redundant, for example, because of the operation of another law or because it ceases to have any practical application.

New s87(g) permits technical amendments to clarify the language of the Territory Plan provided the changes do not change the underlying substance of the Plan. For example, this would include changing a subject heading to make it more clear, adding more helpful cross references between provisions, or changing the appearance of a map to make it more clear without changing the material boundaries. This would also permit changes to the wording of basic text provided the change is cosmetic only.

Clause 7 Is consultation needed for technical amendments?
New section 88(1)(c)

Clause 7 inserts new s88(1)(c). This new section requires technical amendments made under new s87(g) (variations to clarify language) to be subject to public consultation under s90 before making under s89. Public consultation on such amendments is necessary to permit public input into whether the changes do indeed make the language more clear as intended and also as to whether the change is, as required, cosmetic only.

Public consultation is not required for technical amendments under new ss87(e) (variations to bring TP into line with national capital plan). This approach is not new and is consistent with existing ss87(e), 88. Public consultation is not required in this case because such amendments are typically of a straightforward, black and white nature.

Public consultation is not required under new s87(f) (variations to remove redundant provisions). Public consultation is not required in this case because the requirement for and execution of such amendments are typically of a straightforward, black and white nature.

Clause 8 Making technical amendments
Section 89(2)

Clause 8 deletes section 89(2) and substitutes a new section.

Some but not all "technical amendments" to the Territory Plan (refer to clause 6 for notes on "technical amendments) require public consultation (s88). The new s89(2) makes it clear that the Planning and Land Authority can amend a proposed technical amendment as a result of such consultation.

Clause 9 New section 116A
effect of s134 on development approval

Clause 9 inserts new s116A. Clause 9 should be read in conjunction with clauses 10 , 11 and 15.

New section 116A inserted by this clause 9, new s120A inserted by clause 10 and new s129A inserted by clause 11 are identical except that they apply to the assessment of development applications in the code, merit and impact assessment tracks respectively and also include different examples appropriate to each track.

Under section 7(1)(d) the "use" of land or buildings is "development" and development approval is ordinarily required for such "use" because development without approval is an offence under s199. However, s134, in summary, states that use authorised by a lease or licence is exempt from the need for a development approval. This s134 exemption is subject to certain exceptions. In particular, the exemption ceases if other development of a type that requires development approval (ie is not exempt from the need to obtain approval) occurs on the relevant land. For example, the use of land ceases to be exempt under s134 if a large building is constructed on the land and the construction of the large building required development approval. The s134 exemption ceases the moment construction of the new large building commences (s134(3)).

New sections 116A, 120A, 129A are to clarify the effect of sections 7(1)(d) and 134 on the assessment of development applications. The new sections apply in the situation where:

- the use of land is authorised by a lease and as such is exempt under s134 from requiring development approval;
- the lessee seeks to construct a new building (or other structure) on the land that would require development approval; and
- therefore the exemption under s134 for use would cease when the construction is undertaken; and
- therefore the proposed construction would necessitate an application for development approval for the new construction as well as the use of the land and use of the new building.

New sections 116A, 120A, 129A are to make it clear that in assessing the development application for the use of the new building and land the Planning and Land Authority is not required to revisit, assess or re-assess the existing use of the land (ie the use already authorised under the lease) except as context for assessing the new construction work and the use of the new building.

Specifically, new sections 116A, 120A, 129A provide that the relevant development application cannot be refused on the basis that a hypothetical development application solely for the existing use of the land and existing buildings (ie without the new building) would be refused. Similarly, the development application cannot be conditioned on the basis that that a hypothetical development application solely for the existing use of the land and existing buildings would be conditioned. In other words, refusal of the application or conditioning of the approval must be required as a result of assessment of the new building and use of the new building and not arise from issues relating solely to the existing use of the land and existing buildings as authorised under an existing lease.

Clause 10 New section 120A

Clause 10 inserts new s120A. Refer to the notes on clause 9.

Clause 11 New section 129A

Clause 11 inserts new s129A. Refer to the notes on clause 9.

Clause 12 New section 131B

The assessment tracks for assessable development, from minimum to maximum and as noted in s54(3):

- code (minimum track for low impact matters that can be assessed against "black and white" rules);
- merit (standard assessment track for matters assessed against rules and performance based criteria); and
- impact (highest track for high impact, complex matters requiring an environmental impact statement)

All development applications must be assessed in the required assessment track that is the code, merit or impact assessment tracks (s113). The time frames and procedures for assessment vary depending on the relevant assessment track (Part 7.2). The minimum assessment track is as specified in the development tables of the Territory Plan (ss54(1)(a), 54(3)) and section 123 on the impact track.

New s131B makes the default assessment track for assessment of development applications for lease variations (subject to exceptions) the merit track. This default does not apply if the development tables of the Territory Plan or section 123 provide otherwise. Lease variations to add a new authorised use must be assessed in the track that applies to the proposed use as determined by the development tables of the Territory Plan. New s131B in effect applies a default track to apply in the event that the Territory Plan is silent on the matter.

New s131B does not apply to lease variations in designated areas, such variations are already covered by s131A.

Clause 13 Section 133

Clause 13 substitutes new s133. Clause 13 should be read in conjunction with clause 108.

New s133 provides that notwithstanding anything in the regulations or the development tables of the Territory Plan, a development cannot be exempt from requiring development approval if the development would breach an express condition of an already existing development approval for development on the same land. New s133 does not apply to the exemption of use in the Act under s134. The scope of section 134 remains as set out in detail in s134.

Clause 14 Exempt development – authorised use
Section 134(6)(b)

Clause 14 substitutes new s134(6)(b). Clause 14 should be read in conjunction with clause 36.

Under s7(1)(d) "development" includes the use of land or buildings on the land. Development without approval is an offence under s199. Development approval is therefore required for the use of land unless the use is exempt from the need for an approval under ss133, 134. Section 134, in summary, states that use authorised by a lease or licence is exempt from the need for a development approval.

This s134 exemption is subject to certain exceptions. In particular, the exemption ceases if other development of a type that requires development approval (ie is not exempt from the need to obtain approval) occurs on the relevant land (ss134(2), (3)).

Sections 134(5), (6) also determine when the exemption from the need for a use approval ends. Under s134(5) the exemption ends if the relevant lease expires and is not renewed under s254. Section 254 permits renewal of a lease by application within 6 months of expiry of the lease. In connection with land occupied under a licence rather than a lease, under s134(6) the s134 exemption ends if the licence expires irrespective of whether the licence is renewed. There is then an inconsistency in approach to the s134 exemption for leases and licences. The distinction, originally intended to recognise the lesser status of licences relative to leases has proven impractical, serving no significant purpose. New s134(6)(b) removes this inconsistency. The new section provides that the s134 exemption re use of land under a licence/permit continues after expiry of the licence/permit provided the licence/permit is renewed within 6 months of that expiry. This is consistent with the existing approach taken to leases under ss134(5), 254.

The amendments in clause 36 are consistent with this clause 14 and are made for the same reasons.

Clause 15 Section 134, new note

This clause inserts a new note after s134(8). This clause should be read in conjunction with clauses 9, 10, 11.

Clause 15 inserts a note to emphasise that once a development approval for use of land is granted a fresh development approval is not required in association with the construction of new buildings/structures on the land - unless the scope of the existing use approval is narrow and as such does not cover the proposed use of the new building/structure.

Clause 16 What is publicly notifies for ch 7?
Section 152(2)(a)

Clause 16 substitutes new s152(2)(a). This is a technical amendment with no substantive change. The new wording is consistent with the wording of s152(2)(b).

Clause 17 New section 154(3)

Clause 17 inserts new s154(3).

A lease variation is “development” (s7(1)(f)) and as such, unless exempt, requires development approval (it is an offence under s199 to undertake development without approval). Development applications for approval of lease variations must be publicly notified (unless the application is in the code assessment track) (s152). The public notification must include notification of holders of a registered interest in the land in the relevant lease (ie interests registered in the Land Titles Register), if any (ss152(1)(b)(ii), 152(2), 154).

The new section 154(3) provides that a procedural failure to notify holders of a registered interest does not invalidate any ensuing development approval. This provision is consistent with the approach taken in sections 153(5) and 155(5).

There is no reason for the approach in s154 to differ from the existing approaches in s153(5) and 155(5). In this sense new s154(3) corrects an omission in the Act.

Clause 18 New division 7.3.4A

Clause 18 inserts new Division 7.3.4A into the Act. Clause 18 should be read in conjunction with clause 20.

The intention is to enable the Office of Regulatory Services (Registration and Client Services) to include in the register of land titles information on development applications and development approvals. This would enable a person (eg a prospective purchaser) to look at a lease and see whether any application for development approval applies and under new s170(1)(c) inserted by clause 20 whether a development approval applies.

New Division 7.3.4A requires the Planning and Land Authority to notify the Registrar-General of all development applications. The notifications are to include a short description of the application and also the status of the application, for example, whether the application is pending, approved or approved with conditions.

Once the information is forwarded the Registrar-General is to make a record of the information (record of administrative interests under part 8A of the *Land Titles Act 1925*) in association with the relevant lease. The record does not form part of the lease title but is adjacent information that can be referred to.

Clauses 19 Direction that development applications be referred to Minister Section 158(3)

Clause 19 substitutes new s158(3).

The Minister may direct the Planning and Land Authority to refer a development application to the Minister (s158(1)). After referral the Authority must stop working towards a decision on the application (s158(3)) and the Minister must consider whether to decide the application him or herself or send the matter back to the Authority for decision (s159). In making this decision the Minister must take account of the factors set out in s159(2). This process is often referred to as a "call in" as in the Minister "calls in" a development application for decision by the Minister.

If after referral under s158(1), the Minister elects to not decide the development application after all, the Minister then refers the application back to the Authority (s159(3)). In this case, the prohibition against further work by the Authority as per s158(3) ceases to apply and the Authority then decides the application in the normal way (s159(3)).

New s158(3) clarifies what happens to a development application if the Minister requires the Planning and Land Authority to refer a development application under s158(1). Under the new section, the Authority must stop its own internal assessment processes leading to a decision, however, standard procedural steps are to continue, for example public notification and referral of the application to agencies for comment (unless the Minister specifically directs the Authority to the contrary).

Clause 20 Notice of approval of application
Section 170(1)(c)

Clause 20 substitutes a new section 170(1)(c). Clause 20 should be read in conjunction with clause 18.

New s170(1)(c) requires the Planning and Land Authority to notify the Registrar-General of all development approvals (not just development approvals related to the use of land as in existing section 170(1)(c)). Refer to the notes on clause 18 for further information on this matter.

Clause 21 When development approvals take effect-ACAT review
Section 178(1)(b)

Clause 21 substitutes new s178(1)(b). Clause 21 is a technical amendment. This clause should be read in conjunction with clauses 22, 24, 26, 28. New s178(1)(b) inserted by this clause 21 is consistent with and made for the same reasons as, new:

- s178(2) inserted by clause 22;
- s179(2) inserted by clause 24;
- s180(2) inserted by clause 26; and
- s182(2) inserted by clause 28.

New s178(1)(b) inserted by this clause 21 also contains wording that is similar to elements of the wording of new:

- s178(2)(b) inserted by clause 23;
- s179(2)(c)(i) inserted by clause 25;
- s180(2)(c)(i) inserted by clause 27; and
- s182(2)(c)(i) inserted by clause 29.

Refer to the notes on clause 23.

Section 178 determines when certain development approvals take legal effect. Section 178 applies if, among other things, the development approval is the subject of a merit review application to the ACAT and the ACAT "confirms the decision [to grant the development approval] (whether completely or partly);" (s178(1)(b)). The intention is for this section to apply if the development approval is affirmed by ACAT even if ACAT varies the decision eg by imposing additional conditions.

Clause 21 deletes the words "(whether completely or partly)" from s178(1)(b) and substitutes the words "confirms or varies the decision, or makes a substitute decision". The new words are a more helpful description of possible outcomes from ACAT hearings and are consistent with the terminology used in s68 of the *ACT Civil and Administrative Tribunal Act 2008*.

Note if ACAT sets aside the development approval and remits the matter back to the Planning and Land Authority for decision under s68(3)(c)(ii) of the ACT Civil and Administrative Tribunal Act, then the date the development approval (if granted) takes effect is determined as though ACTPLA were granting the approval for the first time by the applicable section of Division 7.3.9 Effect and duration of development approvals.

Clause 22 Section 178 (2)

Clause 22 amends s178(2). Refer to the notes on clause 21.

Clause 23 Section 178 (2) (b)

Clause 23 substitutes new s178(2)(b). Clause 23 should be read in conjunction with clauses 25, 27 and 29. New s178(2)(b) is consistent with, and made for the same reasons as, new:

- s179(2)(c)(i) inserted by clause 25;
- s180(2)(c)(i) inserted by clause 27; and
- s182(2)(c)(i) inserted by clause 29.

New ss178(2)(b), 179(2)(c)(i), 180(2)(c)(i) and 182(2)(c)(i) apply to decisions of the Planning and Land Authority to grant development approvals that are subject to merit review in the ACT Civil and Administrative Tribunal (ACAT).

The new sections make it clear that the development approval commences operation (takes legal effect) from the day that the ACAT "confirmation, variation or substitution …" takes effect. This is the case irrespective of whether the decision is or might be subject to an ACAT internal appeal (s79 of the *ACT Civil and Administrative Tribunal Act 2008*) or a supreme court appeal.

The new sections do not affect the ability of a court or tribunal to hear appeals and stay a decision pending an appeal should it consider it appropriate to do so (refer ss68, 69 ACT Civil and Administrative Tribunal Act). Note ACAT may decide to set aside the development approval and remit the matter back to the Planning and Land Authority for decision (ie remit under s68(3)(c)(ii) of the ACT Civil and Administrative Tribunal Act). In this case, the date the development approval (if granted) takes effect is determined as though ACTPLA were granting the approval for the first time by the applicable section of Division 7.3.9 Effect and duration of development approvals.

As noted above new s178(2)(b) refers to the day that the ACAT "confirmation, variation or substitution" takes effect. The new words "confirmation, variation or substitution" replace the former words "confirmed by the ACAT (whether completely or partly)" The new words are a more helpful description of possible outcomes from ACAT hearings and are consistent with the terminology used in s68 of the *ACT Civil and Administrative Tribunal Act 2008*. These new words are also consistent with the wording in new:

- s178(1)(b) inserted by clause 21;
- s178(2) inserted by clause 22;
- s179(2) inserted by clause 24;
- s180(2) inserted by clause 26; and
- s182(2) inserted by clause 28.

Clause 24 When development approval takes effect—activity not allowed by lease
Section 179 (2)

Clause 24 amends s179(2). Refer to the notes on clause 21.

Clause 25 Section 179 (2) (c) excluding note

Clause 25 substitutes new s179(2)(c). Refer to the notes on clause 23.

Clause 26 When development approval takes effect—condition to be met Section 180 (2)

Clause 26 amends s180(2). Refer to the notes on clause 21.

Clause 27 Section 180 (2) (c)

Clause 27 substitutes new s180(2)(c). Refer to the notes on clause 23.

Clause 28 When development approval takes effect—application for reconsideration Section 182 (2)

Clause 28 amends s182(2). Refer to the notes on clause 21.

Clause 29 Section 182 (2) (c)

Clause 29 substitutes new s182(2)(c). Refer to the notes on clause 23.

Clause 30 End of development approvals other than lease variations Section 184 (2) (c)

Clause 30 substitutes new s184(2)(c). Clause 30 should be read in conjunction with clauses 31, 33, 34, 35, 37, 91.

New s184(2)(c) inserted by this clause 30 is consistent with, and made for the same reasons, as new:

- s184(2)(e)(iii) inserted by clause 31
- s184(4)(b) inserted by clause 33
- s185(2)(b) inserted by clause 34
- ss186(3),(4) inserted by clause 35
- s187(3) inserted by clause 37.

Sections 184-189 set out the circumstances in which and the time when development approvals come to an end. In summary, development authorised by a development approval must start and finish within the dates set out in the development approval. If no dates are indicated, default periods apply. The default periods require the development to start within two years of the approval taking effect (eg s184(2)(c)) and require the development to be completed within two years of starting (eg s184(2)(e)).

In some cases, the grant of a development approval may be subject to a merit review application to the ACAT or other appeal to another court. The proponent may be unwilling or unable to commence or continue the development pending the outcome of the appeal. In this circumstance the time that the proponent has to commence and complete development is in practical terms reduced by the time taken by the appeal process.

New section 184(2)(c) addresses this issue by making the relevant default periods for starting and finishing the development two years plus the time taken by an appeal process (if any).

Clause 91 is required as a consequence of clauses 30, 31, 33, 34, 35, 37. Clause 91 inserts a new definition of “ends” in relation to the end of appeal. Under the new definition an appeal ends when it is decided, withdrawn or struck out.

Clause 31 New section 184(2)(e)(iii)

Clause 31 inserts new s184(2)(e)(iii). Clause 31 should be read in conjunction with clauses 30, 33, 34, 35, 37, 91. Refer to the notes on clause 30.

Clause 32 Section 184(2)(f)

Clause 32 substitutes new s184(2)(f). This is a technical amendment to correct an error.

Section 184(2)(f) terminates development approvals when the due date required for completion of the development under the relevant lease expires and does so irrespective of whether the development has been completed on time. This is incorrect, the termination should only occur if the development is not completed by the due date consistent with existing ss184(2)(a),(b),(c),(e). New s184(2)(f) corrects this error.

Clause 33 Section 184 (4), definition of *prescribed period* paragraph (b)

Clause 33 substitutes new s184(4)(b). Clause 33 should be read in conjunction with clauses 30, 31, 34, 35, 37, 91. Refer to the notes on clause 30.

Clause 34 End of development approvals for lease variations Section 185 (2) (b) (except note)

Clause 34 substitutes new s185(2)(b). Clause 34 should be read in conjunction with clauses 30, 31, 33, 35, 37, 91. Refer to notes on clause 30.

Clause 35 End of development approvals for use under lease without lease variation, licence or permit Section 186 (3) and (4)

Clause 35 substitutes new ss186(3) & (4). Clause 35 should be read in conjunction with clauses 30, 31, 33, 34, 37, 91. Refer to notes on clause 30.

Clause 36 End of development approvals for use under licence or permit Section 187(2)(d), except note

Clause 36 deletes s187(2)(d) (other than the note) and substitutes new ss187(2)(d),(e). The existing note under s187(2)(d) is retained.

Clause 36 should be read in conjunction with clause 14.

Section 187 determines when a development approval for the use of land under a licence or permit ends. Existing s187(2)(d) states that the development approval for the use of the land ends if the licence/permit expires or ends for other reasons. The approval ends even if the licence/permit expires and is renewed.

New section 187(2)(d) provides that development approval for the use of the land does not end if the licence expires provided the licence is renewed within a 6 month period following expiry.

The new ability to retain the development approval for use provided the licence/permit is renewed within 6 months of its expiry is similar to the approach taken to use approvals and leases under ss186(2)(a), 254.

This removes an inconsistency in approach to use approvals. The distinction, originally intended to recognise the lesser status of licences relative to leases, has proven impractical serving no significant purpose.

Clause 37 Section 187 (3)

Clause 37 substitutes new s187(3). Clause 37 should be read in conjunction with clauses 30, 31, 33, 34, 35, 91. Refer to the notes on clause 30.

Clause 38 Applications to amend development approvals Section 197(1), new note

Clause 38 inserts a new note under s197(1), The new note is to underline the point that the processes for changing a development approval under ss197, 198 do not apply to matters (eg alterations to building design plans) that are required to be done as a condition of the original development approval. Such matters do not amount to changes to the original approval and so are not subject to the requirements of ss197, 198.

Clause 39 Deciding applications to amend development approvals Section 198(1), example

Clause 39 amends the example under s198(1). The amendment to the example is a minor change to make the example more relevant, more clear.

Clause 40 Section 198 (1), new note

Clause 40 inserts a new note under s198(1). Clause 40 should be read in conjunction with new s198(2) inserted by clause 41. The new note highlights the requirement for an application to amend a development approval made under s197(2) to be decided as soon as possible (as required by s151B of the Legislation Act).

Clause 41 Section 198 (2)

Clause 41 deletes s198(2) and substitutes new ss198(2),(2A).

It is possible to apply to the Planning and Land Authority for an amendment (minor change) to an already granted development approval. Sections 197 and 198 set out the process for this. In summary, applications can be made if the amendment would not amount to a substantial change to the approval. In addition, the amendment must not shift the relevant assessment track for the approval. As set out in s54(3) the three assessment tracks from minimum (lowest) to maximum (highest) are:

- code track;
- merit track; and
- impact track.

If the amendment is too substantial and so cannot be dealt with under the amendment process, the lessee must apply for a new development approval.

New s198(2) is to make it clear, explicit that the statutory time frames for deciding original development applications do not apply to applications for amendment of already granted development approvals.
This is considered appropriate because applications to amend an already granted approval are restricted to minor matters only which do not warrant the time frame provisions that apply to original applications under ss162(3), 162(6), 166-169.

However, the decision to grant or refuse the application for amendment must still be made "as soon as possible" as required under s151B of the Legislation Act. Clause 40 inserts a note to this effect.

New ss198(2A)(a),(b) relax a little the prohibition against amendments that would shift the relevant assessment track. The new section permits amendments which would shift the relevant assessment track to a "lower track" but not amendments that entail a shift to a "higher track". This is on the basis that an amendment that would shift the proposal to a lower track would typically be a much less substantial amendment than a shift in the opposite direction and as such would be a matter that is suited to this amendment process.

New s198(2A)(c) applies to development approvals that were the subject of an application to the ACAT for merit review or appeal to the Supreme Court and include a development approval condition required by decision of the tribunal or court. The clause provides that sections 197, 198 cannot be used to remove or change a development approval condition required as a result of a decision of a tribunal or court.

Clause 42 Development applications for developments undertaken without approval
New section 205 (1A)

Clause 42 inserts new s205(1A).

New section 205(1A) applies in the following circumstance. Someone constructs a building without the required development approval. Sometime after the building is completed the Planning and Development Regulation changes with the result that if this construction were to start afresh it would be exempt from requiring development approval.

The clause provides that in this (unusual) circumstance the original construction work is to be considered lawful as though the work was undertaken after the new exemption from approval became available. This new section is not to affect any compliance or other proceedings taken in relation to the construction work whether commenced before or after the new exemption regulation.

Clauses 43 Definitions-ch 9
Section 234, definition of *rental lease*

Clause 43 and clauses 55, 57, 58, 90, 93 make technical amendments as a consequence of the new definition of "nominal rent" made by clause 92.

Clause 44 Meaning of concessional lease and lease
Act Section 235 (1), definition of concessional lease, paragraph (a)

Clause 44 amends s235(1)(a) by omitting the words "to the Territory" at the end of the introductory paragraph of s235(1)(a). This clause should be read in conjunction with clauses 45, 46, 47. Refer to the notes on clause 45 for the reasons for this amendment.

Clause 45 Section 235(2)

Clause 45 substitutes new s235(2). This clause should be read in conjunction with clauses 44, 46, 47.

Section 235 defines the term "concessional lease". In summary and subject to exceptions a "concessional lease" is a lease granted for less than market value (s235(1)(a)). Section 265 prohibits the selling of concessional leases or other dealings in concessional leases without the consent of the Planning and Land Authority. A dealing made in contravention of this requirement is of no effect (s265(2)). A lease ceases to be a concessional lease if sometime after the grant either the market value is paid (s235(1)(a)(i)) or the rent for the lease is paid out such that the lease becomes a nominal rent lease (s235(1)(a)(ii)).

The words "to the Territory" in the introductory paragraph of s235(1)(a) have the effect of requiring such subsequent payments to be made to "the Territory". "The Territory" is defined in the Legislation Act as "… the body politic established by the Self-Government Act, section 7 … [or alternatively the geographical area of the ACT]". As a result, if payment is made to an entity other than "the Territory" so defined then it is arguable that the relevant lease remains a concessional lease. This is not the intention, the lease should cease to be a concessional lease if the market value is paid irrespective of whether the payment was made to the Territory or to another government entity.

Clause 44 omits reference to "the Territory" from s235(1)(a). Clause 45 substitutes new s235(2)(a) to permit payments to be made to Territory entities, Commonwealth entities or entity that granted the original lease as well as payments to "the Territory".

Clause 46 inserts new definitions of "Commonwealth entity" and "Territory entity" into s235(3) for the purpose of new s235(2)(a). Together these amendments make it clear that payments of market value (or of an amount to pay out the rent) remove the concessional status of the lease irrespective of whether the payment(s) is made to:

- the Territory;
- the Commonwealth;
- a Commonwealth authority (as defined under s7 of the *Commonwealth Authorities and Companies Act 1997* (Cwlth));
- a Commonwealth Company (as defined under s34 of the Commonwealth Authorities and Companies Act);
- a territory authority (as defined in the Legislation Act);
- a territory instrumentality (as defined in the Legislation Act);
- a territory-owned corporation (as defined in the Legislation Act); or
- entity that granted the lease.

Clause 45 also substitutes new s235(2)(b). This new section simply reproduces a provision that is already in the Act (s235(2)) with no change other than to express it in a new separate subsection. This is a technical amendment made for drafting reasons associated with the creation of new s235(2)(a) inserted by clause 45.

Clause 47 inserts new s235(4). New s235(4) is a transitional section to ensure that new ss235(1)(a), (2)(a) applies not just to future payments but also to payments made in the past.

This makes it clear that if payment of market value for a lease has been made to an entity listed in new ss235(2)(a), 235(3) the lease is not a concessional lease. New s235(4) makes it clear that this is the case irrespective of whether the payment was made before or after these amendments or before or after the commencement of the Act on 31 March 2008.

This element of retrospectivity is important in respect to past sales of such leases, for example. As noted above, the sale of a concessional lease without the consent of the Planning and Land Authority is prohibited and is of no effect (s265). This retrospectivity will ensure that past sales of such leases do not contravene s265 simply because the payment of market value was made to an entity other than "the Territory". This element of retrospectivity is justified on the basis that the amendments made in clauses 44, 45, 46, 47:

- are to correct an unintended anomaly resulting from the use of the phrase "to the Territory";
- are consistent with the existing principle that payment of market value for the lease should mean that the lease ceases to be a concessional lease;
- do not operate to anyone's disadvantage; and
- provide certainty as to the validity of past sales of leases or other dealings where payment of market value has been paid to an entity other than "the Territory".

Clause 46 Section 235 (3), new definitions

Clause 46 inserts new definitions of "Commonwealth entity" and "Territory entity" into s235(3) for the purpose of new s235(2)(a) inserted by clause 45. Clause 46 should be read in conjunction with clauses 44, 45, 47. Refer to the notes on clause 45 for the reasons for this amendment.

Clause 47 New section 235(4)

Clause 47 inserts new s235(4). Clause 47 should be read in conjunction with clauses 44, 45, 46. Refer to notes on clause 45.

Clause 48 New section 238A

Clause 48 inserts new s238A. This is a technical amendment.

In the past, leases were sometimes granted subject to the condition that specified development be approved by the Planning and Land Authority (or predecessor equivalent) before commencement of construction work.

Such a requirement is unworkable if the relevant development is identified in the Regulation as exempt from the need to obtain approval (s133, s20 of Regulation, schedules 1, 1A of Regulation). This is because development that is exempt does not require approval and further approval cannot be granted (s135). The amendment provides that such requirements in the lease are deemed to have no effect in relation to development that is exempt.

Clause 49 Restriction on direct sale by authority
Section 240 (2)

Clause 49 substitutes new s240(2). Clause 49 should be read in conjunction with clause 50.

A lease can be granted by the Planning and Land Authority by auction, tender, ballot or direct sale (s238(1)). Under a direct sale the lease is granted to a selected recipient without any competition (auction, tender) or ballot process. Section 240 prohibits the Authority from granting a lease through direct sale except in specified circumstances. The specified circumstances include approval by the Territory Executive.

Under s240(1)(a) the Executive can approve the grant of leases by direct sale provided the lease is of a type identified in the Regulation (s105 of Regulation) and the grant is consistent with criteria set out in the Regulation (ss106-114 of Regulation). In addition, under s240(2) the Territory Executive can approve the grant of a lease by direct sale contrary to the criteria in the Regulation if the Executive is satisfied that the grant would:

- benefit the economy of the ACT or region;
- contribute to the environment, or social or cultural features in the ACT;
- introduce new skills, technology or services in the ACT;
- contribute to the export earnings and import replacement of the ACT or region; and/or
- facilitate the achievement of a major policy objective.

New section 240(2) makes it clear that the Territory Executive is able to approve a direct sale under s240(2) (ie a direct sale contrary to the criteria in the Regulation) only if the Executive is satisfied that the relevant objective can only be met or met to the desired degree by direct sale as opposed to auction, tender or ballot.

Clause 50 Section 240(4), new definition of *grant objective*

Clause 50 inserts a definition of "grant objective" into s240(4). Clause 50 should be read in conjunction with clause 49. Clause 50 is a technical amendment. The definition does not change the existing objectives in the Act other than to shift them to a separate section for drafting reasons associated with new s240(2) inserted by clause 49.

Clause 51 Payment for leases
Section 246(2)(a)

Clause 51 amends s246(2)(a). This is a technical amendment only with no substantive change. The terminology in new s246(2)(a) is consistent with the correct terminology in s246(1).

Clause 52 Failure to accept and execute lease
Section 250(4)

Clause 52 amends s250(4). This is a technical amendment to omit words that are redundant.

Clause 53 Restrictions on dealings with certain leases
New section 251(1)(c)(iii) and (iv)

Clause 53 amends s251(1)(c) by inserting new ss251(1)(c)(iii),(iv). Clause 53 should be read in conjunction with clause 97.

Section 251 prohibits dealing (eg transfer) in certain specified leases without the consent of the Planning and Land Authority.

This restriction remains for the period specified in s251(7). This restriction applies to, among others, leases granted through a direct sale (s251(1)(c)) subject to exceptions (s251(1)(c)(i),(ii); s251(4)). The period of restriction in this case is five years following the grant of the lease (s251(7)(c)).

New ss251(1)(c)(iii),(iv) provide that the five year restriction on dealing in a lease granted through a direct sale process (s251(1)(c), 251(7)(c)) does not apply to:

- leases that were subject to an auction (s238(1)(a)) but still unsold at the end of the auction (ie the auction failed) and as a result sold soon afterwards by direct sale (eg by direct negotiation with the highest bidder(s) at the failed auction) (new s251(c)(iii));
- leases subject to a ballot process (s238(1)(c)) but still unsold at the end of the ballot (ie the ballot failed) and as a result sold soon afterwards by direct sale (new s251(c)(iii)); and
- leases subject to a ballot process (s238(1)(c)) and sold through this process if the relevant contract of sale is then rescinded before the lease is granted under the contract and as a result sold soon afterwards by direct sale (new s251(c)(iv))

New ss251(1)(c)(iii),(iv) do not effect new policy. These same exceptions to the s251 restriction already exist in s142(2)(e) of the Regulation which is deleted by clause 97. Clauses 53 and 97 shift this policy from the Regulation to the Act. This shift is made because of the significance of these exceptions and because they are unlikely to need changing in the future.

Clause 54 New section 251(1A)

Clause 54 inserts new section 251(1A). This clause should be read in conjunction with clause 96.

New section 251(1A) makes it clear that the five year restriction on transfers under s251 does not apply to concessional leases as these are subject to separate restrictions on transfer under ss265, 266) nor rural leases as these are subject to separate restrictions under s284.

Clause 55 Decision on rent payout lease variation application Section 272B(1)(a)

Clause 55 and clauses 43, 57, 58, 90, 93 make technical amendments as a consequence of the new definition of “nominal rent” made by clause 92.

Clause 56 Section 272B(3)

Clause 56 substitutes the correct wording for “planning and land authority”.

Clause 57 Power to decide rent payout applications deemed refused Section 272D(2)

Clause 57 and clauses 43, 55, 58, 90, 93 make technical amendments as a consequence of the new definition of “nominal rent” made by clause 92.

Clause 58 Lease to be varied to pay out rent
Section 273(3)

Clause 58 and clauses 43, 55, 57, 90, 93 make technical amendments as a consequence of the new definition of "nominal rent" made by clause 92.

Clause 59 Dealings with rural leases
Section 284(4)

Clause 59 substitutes new s284(4).

Section 284(2) prohibits dealings in rural leases without the consent of the Planning and Land Authority. Existing section 284(4) sets out the possible grounds for giving consent such as the fact that the proposed purchaser of the lease is the lessee's child or domestic partner. At least one of the grounds in s284(4) must exist for consent to be given.

Section 283 requires persons who seek:

- a grant of a rural lease;
- a variation of a rural lease; or
- to purchase a rural lease;

to first enter into a land management agreement with the Territory about managing the relevant rural land. The grant, variation or sale of the land cannot occur until the land management agreement is made.

New s284(4) makes it clear that if one of the grounds in s284(4) for granting consent to a dealing in a rural lease does exist and the requirement in s283 for a land management agreement (if applicable) is satisfied then the Planning and Land Authority must consent to the proposed dealing. In other words, the Authority has no discretion to refuse consent in this circumstance.

Clause 60 Transfer of land subject to building and development provision
New section 298(2)(b)(v)

Clause 60 inserts new section 298(2)(b)(v). This clause should be read in conjunction with clause 61.

Leases typically include clauses requiring development to be completed by a certain date. If the development is completed as required then the Planning and Land Authority must (on application) issue a "certificate of compliance". If the development is not completed then a certificate is not issued and the lease (subject to exceptions) cannot be transferred (s298(1)). The exceptions to this transfer restriction are set out in s298(1). A transfer can still proceed if it is approved by the Authority. The grounds for approving such transfers are set out in sections 298(2)-(5).

Clause 60 inserts a new ground for approval of a transfer of a lease that does not yet have a certificate of compliance. The clauses permit Territory or Commonwealth entities to apply for transfer approval on the ground that the transfer is required as a result of a change in relevant government policy. The policy change must be a general one applying to multiple transfers not just the transfer relevant to the application.

For example, this will permit the Defence Housing Authority (Commonwealth) to apply for approval of a transfer of a lease on the ground that a change to Commonwealth defence housing policy (eg to house defence personnel in a different location) has removed the need to develop the lease.

Clause 61 inserts a definition of "Commonwealth entity" and "territory entity" for the purposes of section 298, ie for new s298(2)(b)(v).

Clause 61 New section 298(6)

Clause 61 inserts new section 298(6). This clause should be read in conjunction with clause 60.

Clause 61 inserts a definition of "Commonwealth entity" and "territory entity" for the purposes of section 298, ie for new s298(2)(b)(v) inserted by clause 60.

Clause 62 Section 298A heading

Clause 62 substitutes a new heading for s298A. Clause 62 should be read in conjunction with clauses 63, 65, 80, 81, 82, 84. Clause 62 is a technical amendment.

The term "building and development provision" is defined in s234 as a "… a provision of the lease that requires the lessee to carry out stated works on the land comprised in the lease or on unleased territory land.". Such provisions typically require the works to be carried out by a specified date.

Clause 62 and clauses 63, 65, 80, 81, 82, 84 correct the terminology used in references to a building and development provision or works required under such a provision. The new terminology is consistent with the definition in s234.

Clause 63 Section 298A(1)

Clause 63 substitutes a new heading for s298A. Clause 63 should be read in conjunction with clauses 62, 65, 80, 81, 82, 84. Clause 63 is a technical amendment. Refer to the notes on clause 62 for the reasons for this amendment.

Clause 64 Section 298A(3) to (5)

Clause 64 deletes s298A(3) to (5) and substitutes new s298A(3). Clause 64 should be read in conjunction with clause 67.

New leases typically require construction of specified works to commence and complete by specified dates for example 12 months (from the date of grant) to commence and 24 months to complete. Section 298A permits a lessee to apply for an extension of time to commence and or complete the works under the lease. The application is assessed under s298B.

An application for extension of time must include the most recent property rates assessment notice and the required fee as calculated in the formula set out in s298A(3)(b) and determined in accordance with sections 298A(4),(5). The required fee could, in some cases, amount to hundreds of thousands of dollars.

Section 298A(3)(b) requires the prescribed amount to accompany the application for the extension of time. This requirement is omitted in new s298A(3).

Instead new s298C(1) inserted by clause 67 requires the payment to be made *after* the approval of an application for extension of time. New s298C(1) states that the approval is subject to the condition that the required amount be paid. If the required amount is not paid then the approval does not take effect. In other words, the amendments in clauses 64 and 67 have the result that an applicant for extension of time need only pay the required fee after it is confirmed that the application is approved.

Sections 298A(3)(b), (4), (5) set out how the required fee is to be calculated. These sections are deleted by clause 64 but replicated in new s298C inserted by clause 67. The requirements in new s298C are exactly the same as those in existing s298A(3)(b), (4), (5) except the required fee is payable *after* the application for extension of time is approved (rather than at the time of making the application).

Clause 65 Section 298B heading

Clause 65 substitutes a new heading for s298A. Clause 65 should be read in conjunction with clauses 62, 63, 80, 81, 82, 84. Clause 65 is a technical amendment. Refer to the notes on clause 62 for the reasons for this amendment.

Clause 66 Section 298B(3)

Clause 66 amends s298B(3). The revised s298B(3) makes it clear that the Planning and Land Authority *must* approve an application for extension of time to commence or complete works if satisfied that

Clause 67 New section 298C

Clause 67 inserts new section 298C. This clause should be read in conjunction with clause 64. The amendments in clauses 83, 98, 99, 100, 101, 102, 103, 104, 105 are made as a consequence of this clause 67.

Sections 298A(3)(b),(4),(5) are deleted by clause 64 but replicated in new s298C. New s298C has the same effect as deleted ss298A(3)(b),(4),(5) except the required fee for the extension of time is payable *after* the application is approved (rather than at the time of making the application). Refer also to the notes on clause 64.

Clause 68 Content of controlled activity orders Section 358(3)(c)

Clause 68 deletes s358(3)(c) and substitutes new ss358(3)(c),(ca). Clause 68 should be read in conjunction with clause 69.

A “controlled activity” is an activity that can be the subject of compliance action. Controlled activities are listed in schedule 2 (for example a breach of a lease is a controlled activity). Sections 356 – 364 set out the circumstances in which the Planning and Land Authority can issue a controlled activity order to stop a controlled activity or require rectification and related action.

New ss358(3)(c),(ca) and new s358(3)(m) are to make it clear that a controlled activity order can be issued in association with any controlled activity of any description.

Specifically the new sections permit orders to be issued to:

- require compliance with a condition of a lease (or associated agreement requiring completion of development (new s358(3)(c));
- restore land or buildings damaged as a result of breach of a lease condition or development agreement (new s358(3)(ca)); or
- stop or not undertake any controlled activity (new s358(3)(m)).

Clause 69 New section 358(3)(m)

Clause 69 inserts new s358(3)(m). Clause 69 should be read in conjunction with clause 68. Refer to the notes on clause 68 for the reasons for new s358(3)(m).

Clause 70 Entry on notice for rectification work and monitoring Section 391B(2)

Clause 70 substitutes new s391B(2). Clause 70 should be read in conjunction with clauses 71, 73, 74.

An inspector has the power to enter private premises for compliance purposes (eg for checking whether a rectification work order is being complied with). The circumstances in which an inspector can enter are set out in s389. The powers that an inspector can exercise are set out in ss392-393.

An inspector can enter premises without the consent of the occupier under a court order ie a search warrant (s398), rectification work order (s402G) or monitoring warrant (s402Q). The fact that an inspector has tried to gain access to the premises by requesting access through "an intention to enter notice" under s391B but has been refused entry as requested in the notice is a reason (or part reason) for applying to the court for a rectification work order (s402C(e)(ii)). Failure to permit entry following an intention to enter notice is also a reason (or part reason) for seeking a monitoring warrant (s402N(b)(i)).

New s391B(2) inserted by this clause 70, new s391B(6) inserted by clause 71, new s402C(e)(ii) inserted by clause 73 and new s402N(b)(i) inserted by clause 74 are minor amendments to make it clear that the inspector who issues an intention to enter notice and the inspector who physically seeks entry following the issuing of the notice need not be the same individual.

Clause 71 Section 391B(6)

Clause 71 deletes the introduction paragraph to s391B(6) and substitutes a new introduction paragraph. Clause 71 should be read in conjunction with clauses 70, 73, 74.

Clause 72 New section 395B

New section 395B permits the Planning and Land Authority to obtain lessee name and contact details from the Commissioner for Revenue in the ACT Revenue Office.

This information will be able to be used for exercising functions under the Act including notification of neighbouring lessees of nearby development proposals and for compliance purposes. The new section will permit such information to be provided whether the request relates to one lease or to all leases in the ACT.

In other words, the section will permit the Commissioner for Revenue to make available a full data set for all ACT leases as well as periodic updates. This information will enable the Planning and Land Authority to maintain an up to date record of lessee contact details, essential for notification and compliance functions. The requests (including updates) cannot be made more frequently than once every three months (or such longer period as the regulation provides).

The Planning and Land Authority will be able to use this information only for purposes and functions set out in the Act. Use and care of the information will be covered by the secrecy provisions set out in s418.

New section 395B will apply in addition to existing section 395A which already permits the Planning and Land Authority to obtain such information from the Commissioner for Revenue but only for individual leases on a case by case basis and only if it is apparent that a specific record is out of date or incorrect.

In contrast to new s395B there are no limits on the frequency with which requests for information can be made under s395A. Requests for information under s395A are curtailed by the limited grounds on which a request can be made under s395A.

Clause 73 When may inspector apply for rectification work order? Section 402C(e)(ii) and (iii)

Clause 73 deletes ss402C(e)(ii) and (iii) and substitutes new ss402C(e)(ii), (iii) and (iv). Clause 73 should be read in conjunction with clauses 70, 71, 74. Refer to the notes on clause 70 for the reasons for new s402C(e)(ii).

New ss402C(e)(iii),(iv) are the result of technical amendments. The new sections include minor wording changes to correct and make consistent the references to "accompanying authorised person". "Authorised person" is defined in the dictionary through reference to s368(1).

In summary, an "authorised person" is a tradesperson authorised to carry out rectification work in place of a lessee who has failed to carry out under a rectification work order.

Clause 74 When may inspector apply for monitoring warrant? Section 402N(b)(i)

Clause 74 substitutes new s402N(b)(i). Clause 74 should be read in conjunction with clauses 70, 71, 73.

Clause 75 New section 404A

Clause 75 inserts new s404A. Clause 75 should be read in conjunction with clause 106.

These matters were set out in s403 of the Regulation. New s404A sets out procedures and requirements for dealing with assets seized under a search warrant for compliance purposes ie evidence seized for court purposes.

Under new s404A(1) an inspector can remove an asset or leave it on the premises and restrict access to it. It is an offence to interfere with an asset seized but left on the premises with restricted access. New s404A is in the same terms as s403 of the Regulation except the:

- penalty for the offence is increased to 50 penalty units or imprisonment for 6 months or both (under s403 of the Regulation the penalty was 10 penalty units – the maximum penalty for an offence in a Regulation); and
- offence is no longer a strict liability offence.

Clause 106 deletes s403 of the Regulation as new s404A makes it redundant. Clauses 75 and 106 in effect shift these matters from the Regulation to the Act.

Clause 76 ACAT review – people who made representations etc Section 409(2)

Clause 76 amends s409(2).

Section 409(2) applies in situations where a third party wishes to apply for merit review of a decision to grant a development approval. The section requires applications to be made within 4 weeks of the notice of the decision.

New s409(2) deletes "4 weeks" and substitutes "20 working days". The terminology of "20 working days" is consistent with the terminology used elsewhere in the Act eg s176(1)(f).

Clause 77 Section 431

Clause 77 substitutes new s431.

New s431 covers transitional matters.

New section 431(1) provides that the transitional chapter as a whole, subject to the following exceptions, expires three years after the commencement of the Act on 31 March 2008.

New s431(2) provides that, notwithstanding new s431(1), Part 15.1 of the transitional chapter will continue for five years after the commencement of the Act.

This effectively extends the period during which transitional regulations to modify the transitional chapter of the Act will be able to be made. Such regulations will be able to be made up to 31 March 2013 (ie five years after commencement of the Act on 31 March 2008). Under the existing Act the power to make such regulations expired on 31 March 2010. The extended period is necessary to ensure that a quick policy response can be made should unforeseen and pressing issues arise in the medium term. Any modifications made by regulation, like other regulations, are subject to disallowance in the Legislative Assembly.

New s431(2) also provides that Part 15.5 (s448) will expire on 31 March 2013 (five years after commencement day). This is necessary as s448 is an important transitional provision in relation to existing rights to use land. This transitional provision needs to be clearly visible and accessible for an extended period.

New s431(2) also provides that section 467 dealing with plans of management will expire on 31 March 2013 (five years after commencement day). This is necessary because it is anticipated that the relevant plans of management covered by this transitional provision will continue to be required for an extended period.

The remainder of the transitional chapter expires on 31 March 2011 (three years after commencement day) as per new s431(1).

Clause 78 Transitional-development application lodged on or after commencement day for estate development plan given before commencement day
Section 442C(1)(b)

Clause 78 substitutes the correct wording for "planning and land authority".

Clause 79 Transitional—status of leases and licences
New section 456 (1A)

Clause 79 inserts new s456(1A). New section 456(1A) is a technical transitional provision. The new section in conjunction with section 235(3) makes it clear that the term "concessional lease" includes consolidated, subdivided, further or regranted leases where one (or more) of the original leases was a "concessional lease" as defined in the repealed *Land (Planning and Environment) Act 1991* irrespective of whether the original lease(s) was current at the time of commencement of the Act. This amendment is not new policy but is made to make this point more clear.

Clause 80 Section 456A heading

Clause 80 substitutes a new heading for s298A. Clause 80 should be read in conjunction with clauses 62, 63, 65, 81, 82, 84. Clause 80 is a technical amendment. Refer to the notes on clause 62 for the reasons for this amendment.

Clause 81 Section 456A(1)

Clause 81 amends s456A(1). Clause 81 should be read in conjunction with clauses 62, 63, 65, 80, 82, 84. Clause 81 is a technical amendment. Refer to the notes on clause 62 for the reasons for this amendment.

Clause 82 Section 456A(4)

Clause 82 amends s456A(4). Clause 82 should be read in conjunction with clauses 62, 63, 65, 80, 81, 84. Clause 82 is a technical amendment. Refer to the notes on clause 62 for the reasons for this amendment.

Clause 83 Section 456A(4)(b)

Clause 83 amends s456A(4)(b). This is a minor amendment to update a cross reference as a result of new s298C inserted by clause 67. The amendments in clauses 98, 99, 100, 101, 102, 103, 104, 105 are also made as a consequence of clause 67.

Clause 84 Section 456A(5)

Clause 84 substitutes a new heading for s298A. Clause 84 should be read in conjunction with clauses 62, 63, 65, 80, 81, 82. Clause 84 is a technical amendment. Refer to the notes on clause 62 for the reasons for this amendment.

Clause 85 Schedule 1, item 2, column 4

Clause 85 amends column 4 of item 2 of schedule 1. New item 2 of schedule 1 makes it clear that the reference to "applicant" is a reference to the "applicant for development approval" and not a reference to another type of applicant eg an applicant for a procedural court order.

Clause 86 Schedule 1, item 3, column 2

Clause 86 amends column 2 of item 3 of schedule 1. The amendment is to correct an error. The reference to "the decision" in existing column 2, item 3 of schedule 1 should be a reference to "the development proposal". The amendment corrects this.

Clause 87 Schedule 1, item 3, column 4

Clause 87 amends column 4 of item 3 of schedule 1. New item 3 of schedule 1 makes it clear that the reference to "applicant" is a reference to the "applicant for development approval" and not a reference to another type of applicant eg an applicant for a procedural court order.

Clause 88 Schedule 1, item 4, column 2

Clause 88 inserts a new note under column 2 of item 4 of schedule 1. The new note cross references s121(2).

Clause 89 Schedule 1, item 5, column 4

Clause 89 amends column 4 of item 5 of schedule 1. New item 5 of schedule 1 makes it clear that the reference to "applicant" is a reference to the "applicant for development approval" and not a reference to another type of applicant eg an applicant for a procedural court order.

Clause 90 Schedule 1, item 25, column 2

Clause 90 and clauses 43, 55, 57, 58, 93 make technical amendments as a consequence of the new definition of "nominal rent" made by clause 92.

Clause 91 Dictionary, new definition of *end*

Clause 91 inserts a new definition of *end* into the dictionary. The new definition provides that an appeal *ends* when it is decided, withdrawn or struck out. Clause 91 is made as a consequence of, and should be read in conjunction with, clauses 30, 31, 33, 34, 35, 37. Refer to the notes on clause 30 for the reasons for this new definition.

Clause 92 Dictionary, new definition of *nominal rent*

Clause 92 inserts a new definition of "nominal rent" ie 5 cents per year (consistent with current practices). The regulation can set another amount provided the other amount is still nominal (ie minor). Note the nominal rent for nominal rent leases continues to be a rent that is payable on demand, that is it need only be paid if and when required (refer s273(3).

The amendments made by clauses 43, 55, 57, 58, 90, 93 are made as a consequence of the new definition of "nominal rent" inserted by this clause 92.

Clause 93 Dictionary, definition of *nominal rent lease*

Clause 93 and clauses 43, 55, 57, 58, 90 make technical amendments as a consequence of the new definition of "nominal rent" made by clause 92.

Clause 94 Dictionary, definition of *variation*, paragraph (a)(iv)

Clause 94 substitutes new paragraph (a)(iv) in the definition of *variation* in the dictionary. The new definition of *variation* (iv)(B) is to make it clear that lease variations do not include changes to a deed that are anticipated by and in accordance with the relevant lease.

Part 3 Planning and Development Regulation 2008

Clause 95 Legislation amended – pt 3

Clause 95 notes that Part 3 of the bill amends the Regulation.

Clause 96 Exemptions from restrictions on dealings with certain leases Act, s251(3) Section 142(1) and note

Clause 96 deletes s142(1) and note from the Regulation. These provisions are superseded by new s251(1A) inserted by clause 54.

Clause 97 Section 142(2)(e)

Clause 97 deletes s142(2)(e) of the Regulation. These provisions are superseded by new ss251(1)(c)(iii),(iv) inserted by clause 53. Refer to the notes on clause 53.

Clause 98 Section 202 heading

Clause 98 inserts a new heading to s202 of the Regulation. This is a minor amendment to update a cross reference as a result of new s298C inserted by clause 67. The amendments in clauses 83, 99, 100, 101, 102, 103, 104, 105 are also made as a consequence of clause 67.

Clause 99 Section 203 heading

Clause 99 inserts a new heading to s203 of the Regulation. This is a minor amendment to update a cross reference as a result of new s298C inserted by clause 67. The amendments in clauses 83, 98, 100, 101, 102, 103, 104, 105 are also made as a consequence of clause 67.

Clause 100 Section 203(3), definition of *period of extension*, and note

Clause 100 substitutes a new definition of "period of extension" in s203(3) of the Regulation and substitutes a new note. This is a minor amendment to update a cross reference as a result of new s298C inserted by clause 67. The amendments in clauses 83, 98, 99, 101, 102, 103, 104, 105 are also made as a consequence of clause 67.

Clause 101 Section 204 heading

Clause 101 inserts a new heading to s204 of the Regulation. This is a minor amendment to update a cross reference as a result of new s298C inserted by clause 67. The amendments in clauses 83, 98, 99, 100, 102, 103, 104, 105 are also made as a consequence of clause 67.

Clause 102 Section 204(4), definition of *period of extension*

Clause 102 substitutes a new definition of "period of extension" in s204(4) of the Regulation. This is a minor amendment to update a cross reference as a result of new s298C inserted by clause 67. The amendments in clauses 83, 98, 99, 100, 101, 103, 104, 105 are also made as a consequence of clause 67.

Clause 103 Section 205 heading

Clause 103 inserts a new heading to s205 of the Regulation. This is a minor amendment to update a cross reference as a result of new s298C inserted by clause 67. The amendments in clauses 83, 98, 99, 100, 101, 102, 104, 105 are also made as a consequence of clause 67.

Clause 104 Section 206 heading

Clause 104 inserts a new heading to s206 of the Regulation. This is a minor amendment to update a cross reference as a result of new s298C inserted by clause 67. The amendments in clauses 83, 98, 99, 100, 101, 102, 103, 105 are also made as a consequence of clause 67.

Clause 105 Section 207 heading

Clause 105 inserts a new heading to s207 of the Regulation. This is a minor amendment to update a cross reference as a result of new s298C inserted by clause 67. The amendments in clauses 83, 98, 99, 100, 101, 102, 103, 104 are also made as a consequence of clause 67.

Clause 106 Securing things seized under the Act, pt 12.3 Section 403

Section 403 of the Regulation is deleted by this clause 106 because the provisions are superseded by new s404A inserted by clause 75.

Clause 107 Criterion 5 – compliance with lease and other development approvals Schedule 1, section 1.15(1)(a)

Clause 107 deletes s1.15(1)(a) of schedule 1 of the Regulation. This section is superseded by new s133(b) inserted by clause 13. Refer to the notes on clause 13.

Clause 108 Schedule 1, section 1.15(2) and examples

Clause 108 deletes section 1.15(2) and examples in schedule 1 of the Regulation. These provisions are superseded by new s133(b) inserted by clause 13. Refer to the notes on clause 13.