

**2019**

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

**BUILDING AND CONSTRUCTION LEGISLATION AMENDMENT BILL 2019**

**REVISED EXPLANATORY STATEMENT**

**Presented by  
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## **BUILDING AND CONSTRUCTION LEGISLATION AMENDMENT BILL 2019**

This explanatory statement relates to the *Building and Construction Legislation Amendment Bill 2019* (the bill) as presented to the ACT Legislative Assembly.

It has been prepared to assist the reader of the bill. It does not form part of the bill and has not been endorsed by the Assembly.

The statement is to be read in conjunction with the bill. It is not, and is not meant to be, a complete description of the bill. This statement provides information about the intent of the provisions in the bill; however, it is not to be taken as providing a definitive interpretation of the meaning of a provision.

### **Overview of the bill**

The bill amends laws under the policy responsibility of the Environment, Planning and Sustainable Development Directorate that apply to building, construction and related work in the Territory.

The bill amends the following laws:

- *Architects Act 2004*
- *Building Act 2004*
- *Building and Construction Industry (Security of Payment) Act 2009*
- *Construction Occupations (Licensing) Act 2004*
- *Construction Occupations (Licensing) Regulation 2004*

The bill is intended to improve and refine the operation of these laws. The bill will also implement provisions that relate to the ACT Government's *Improving the ACT Building Regulatory System* reform program <https://www.planning.act.gov.au/build-buy-renoate/reviews-and-reforms/building-reforms> and a National Review of Security of Payment Laws <https://www.ag.gov.au/industrial-relations/building-industry/Pages/review-of-security-of-payment-laws.aspx> (links current at the time of presentation).

As conditions change in society and the building and construction industry, it is important that the regulatory system changes with it, accommodating new and emerging practices while maintaining public protections.

## **Architects Act 2004**

The proposed amendments to the *Architects Act 2004*:

- expand the existing delegation powers for the Architects Board; and
- provide for members' attendance at meetings of the Architects Board otherwise than in person.

### Delegation powers

Under section 69A of the Architects Act, the Architects Board (the Board) may delegate the decision to renew an architect's registration to the Registrar appointed under that Act (the Architects Registrar) in prescribed circumstances.

The bill creates a broader delegation power (clause 4), which would allow the Board to consider delegating any of its functions to the Architects Registrar, if appropriate. This could include deciding on applications for new registrations and managing complaints. The bill does not include new functions for the Board.

The making and exercising of any delegation must be in accordance with the *Legislation Act 2001*, Part 19.4. That provides, amongst other things, that delegation of a function, or a part of a function, does not relieve the appointer of the appointer's obligation to ensure that the function is properly exercised; and a delegate must exercise the delegation subject to any conditions, limitations or directions in the instrument making or evidencing the delegation.

### Meetings other than in person

Section 75 of the Architects Act provides that the Board meets at the times and places the chairperson decides. The Board must meet at least four times each year but may meet more often to determine applications for registration or carry out other business. The current provisions imply meeting in person is required. However, the Board has indicated that the business of certain meetings, particularly those to determine applications for registration, need not be conducted at a face-to-face meeting.

The Board often needs to meet more regularly than the minimum number of meetings required by the Act to decide on applications for registration that are made from time to time. The small number of Board members (5) can make it difficult to achieve a quorum if members cannot physically attend the meeting, which can delay decisions on applications.

As the current provisions can be restrictive in the conduct of Board functions and achieving a quorum, the bill includes provisions for the Board to meet using a method of communication that allows members taking part to hear what other members are saying without being in each other's presence, such as teleconference or videoconference, if decided by the chairperson (clause 5). The chairperson is not obliged to use these methods if they are not appropriate to the business of the meeting.

## **Building Act 2004**

The proposed amendments to the *Building Act 2004* are to:

- give government inspectors the power to direct builders and land owners in relation to unsafe or non-compliant building work consistent with powers of electrical inspectors, gasfitting inspectors and plumbing inspectors in relation to work and installations in other construction laws;
- give building certifiers the ability to request a broader range of certificates from engineers in relation to matters of safety, health, and amenity that may affect whether a building is fit for occupation and use;
- clarify the intent of the law in relation to provisions for appointing a building certifier and compliance with building approvals;
- give the Construction Occupations Registrar (the Registrar) powers to display signs and make public information in relation to stop notices; and
- allow owners' corporations to more readily access building plans for their building.

### Directions powers for building inspectors

Government building inspectors appointed by the Registrar under section 128 of the Building Act have a range of powers in relation to entering a site and inspecting building work. While they can issue stop notices for work, they cannot issue a direction to a builder or land owner to correct non-compliant work or take immediate action if a building or part of a building is unsafe.

Under section 8 of the *Electricity Safety Act 1971*, section 32 of the *Water and Sewerage Act 2000* and sections 50 and 51 of the *Gas Safety Act 2000*, inspectors appointed for those Acts can give a person who carried out work regulated under those Acts, or who is the owner of an unsafe or uninspected installation, a written direction to make the work safe or compliant.

The bill includes new powers in new Division 7.2A for building inspectors in relation to buildings and building work consistent with those of other inspectors (clause 19). This will give building inspectors an additional option for use when a stop notice, or other power, may not be appropriate, but work must be made safe or compliant.

The relevant powers apply if a building inspector believes on reasonable grounds that—

- a building does not comply with the Building Act or is unsafe; or
- building work has been done otherwise than in accordance with the Building Act.

If a building is unsafe, an inspector may give the occupier of the premises where the relevant building is situated a written direction not to use the building, or part of a building, until the building is made safe and compliant with the Building Act. A part of a building may include

a room, a building service (such as an appliance or equipment that is an integral part of the building), or installation in a building. The building may be under construction or completed. However, a direction under the section cannot require the evacuation of people from the building or premises. Other powers exist in the Building Act in relation to fitness for occupancy and other ACT laws, such as the *Emergencies Act 2004*, provide for the evacuation of premises if required.

The bill also includes provision that if the inspector believes on reasonable grounds that a building, or building work, is unsafe because work done or supervised by a builder was not done in accordance with the Building Act, the inspector may give the builder a written direction to take stated action to make the building, or building work, safe and compliant with the Building Act.

A direction under the section may also require the person to give the inspector written information about the building, or building work, such as written reports about whether the building work complies. If a direction requires a person to do something they are not licenced, authorised or qualified to do, the person must arrange, and pay for, the thing to be done by someone who is.

The bill includes a new offence that a person must not fail, without reasonable excuse, to comply with a direction. The offence has a maximum penalty of 50 penalty units, which is the same level of financial penalty for offences under the provisions for inspectors in the Acts mentioned above.

Further discussion of these provisions are in the *Offences and penalties* and *Human Rights Implications* sections below.

### Engineers certificates - building certifier requests

Section 47 of the Building Act gives a building certifier the power to request a certificate by a professional engineer as to the structural sufficiency, soundness and stability of the building as erected or altered, if satisfied on reasonable grounds that it is desirable to do so in the interests of people who will occupy or use the building.

Other aspects of a building may pose a threat to potential occupants of a building, and a building certifier may need to confirm that the building, for example, has operational fire protection systems, sufficient access and egress and working ventilation and exhaust systems.

The bill amends section 47 (clause 12) to provide that the owner of a parcel of land where building work is being, or has been, carried out must, if requested by the certifier, give the certifier a certificate by a professional engineer about matters relating to the safety, health and amenity of a building that may affect whether a building as erected or altered is fit to occupy or use. The amendments preserve the existing power in relation to structural

sufficiency, soundness and stability. A professional engineer providing a certificate must be an engineer in the relevant field. Examples are provided in the provisions to help readers.

This amendment will complement the new code of practice for building surveyors made under the *Construction Occupations (Licensing) Act 2004* <https://www.legislation.act.gov.au/di/2019-174/> by supporting building surveyors appointed as certifiers to request additional expert advice in carrying out inspections to determine if building work complies with the Building Act, if required. Nothing in the new provisions at section 47 (1) (b) requires a certifier to request a certificate.

Consequential amendments to the section heading and other provisions referencing this section are located in clauses 11, 13 and 14.

#### Provisions for appointing certifiers and compliance with building approvals

Provisions of the Building Act that relate to appointing a certifier (sections 19 and 19A) state that the owner of land where building work will be carried out may appoint a certifier for the work.

The use of the word ‘may’ is likely to be in recognition that not all work requires a building approval or building certifier under the Act, given that a regulation may exempt certain buildings or building work from the operation of all, or part of the Act. However, the use of the term ‘may’ can imply that appointing a certifier is discretionary, rather than required if building work is not otherwise exempt.

Similarly, section 42 (1) (d) states that work must be carried out in accordance with approved plans. However, this could be read that if no plans are approved, the work need not comply with approved plans.

This bill amends sections 19 and 19A (clauses 6-9) to clarify that unless work is exempt, owners must appoint a building certifier to undertake required building certification functions in relation to the work. It also amends section 42 (1) (d) (clause 10) to clarify that if a building approval is required for building work, the work cannot be undertaken without approved plans and must be undertaken in accordance with approved plans.

#### Powers for publishing information about stop notices

Section 107A of the *Construction Occupations (Licensing) Act 2004* requires publication of certain information about licensees, including in relation to occupational discipline, rectification orders and suspensions on a website as the public register. This is to provide protection to the public by giving information about licensees’ compliance history.

Under the Building Act, the Registrar, a building inspector, or a building certifier may prohibit the carrying out of building work, including further work on a building already under construction, or in relation to work not started, by issuing a stop notice. A stop notice can be given to the owner of land where work is being carried out, a licensee carrying out the work, or any other person undertaking the work.

If a stop notice is given by the Registrar or a building inspector, the decision to give the notice is a reviewable decision. Refusing an application to lift a stop notice is also reviewable.

There are a range of reasons for giving a stop notice, including that work is being undertaken in contravention of a development or building approval, or that there is false, misleading or inaccurate information in a building approval. Not all of these reasons necessarily relate to a failing of the licensed builder carrying out the work.

While it may not always be appropriate to publicise a stop notice, such as in relation to owner-builders, or where there are no broader implications for public safety or protection of the public against poor practices, there may be public safety and public protection implications in relation to some stop notices. In these cases, it is important to be able to make relevant information available to the public regarding a stop notice, or make the public aware the person has been issued a stop notice.

The bill includes provisions to:

- require the Registrar to keep a register of stop notices;
- allow the Registrar if satisfied on reasonable grounds that it is necessary or desirable to protect the public—
  - to display a sign on or near a parcel of land a stop notice has been issued in relation to, stating that a stop notice has been issued;
  - to make available to the public information about a stop notice included in the register of stop notices, other than information it would be inappropriate or illegal to disclose.

The information about a stop notice would be publishable whether or not an application has been made for cancellation of the stop notice or review of the decision to issue the notice, or the time for doing so has ended. However, the register and information provided to the public must be updated not later than the next working day after—

- the stop notice is lifted and it is no longer necessary or desirable to publish the information to protect the public; or
- the Registrar receives a direction from the ACAT or a court about removing information from the register.

The provisions apply to stop notices issued within 10 years previous to the publication of the information, including stop notices already given before the commencement of the provisions, if available.

These provisions are similar to the provisions for the public register under section 107A of the Construction Occupations (Licensing) Act. While the information in the public register is generally only included after any appeal or review period is complete, the register also includes automatic suspensions and interim suspensions the Registrar has placed on a licensee while awaiting the outcome of an application to ACAT for occupational discipline. This is because the suspensions have immediate effect and can affect whether the licensee can undertake any licensable work. Stop notices can have similar implications for specific building projects.

*Human rights implications* are discussed in the relevant section below.

### Access to building plans

Section 145 provides that copies of plans submitted under the Act must not be 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.

If an owners' corporation requires plans of their own complex they require individual signatories of each unit proprietor with a unit depicted in the plans to obtain copies of the plans. If a unit holder is unavailable or does not provide the signature, the owner's corporation is unable to receive all of the relevant plans. However, information about the layout and configuration of units typical in relevant plans is often publicly available on real estate websites, and is not in itself personal information.

The bill amends section 145 so that despite subsection (1) (b) if the plans relate to the common property of a units plan, whether or not the plans also relate to individual units, the following people are entitled to copies of the plans, including any documents attached to the plans:

- (a) the owners corporation for the units plan;
- (b) the owners corporation manager, if the owners corporation has given the manager written authority to have the plans.

However, to protect the privacy of unit owners, the plans given to a person under the new provisions must not include identifying information for the proprietor of a unit, other than a proprietor's name. The full names and addresses of proprietors must be recorded by the owners' corporation under section 114 of the *Unit Titles Management Act 2011* and so would already be available to the owners' corporation. Further, certain building information in relation to the units may already be available to the owners' corporation in another format as part of building information provided by the developer under unit titles laws.



## **Building and Construction Industry (Security of Payment) Act**

The proposed amendment to the *Building and Construction Industry (Security of Payment) Act 2009* (Security of Payment Act) allows the Minister to determine reporting requirements for authorised nominating authorities by notifiable instrument (clause 21).

In response to the National Review of Security of Payment Laws (National Review), the Building Ministers' Forum has agreed to work collaboratively to consider ways to improve consistency between security of payment regimes across jurisdictions. The Building Ministers' Forum is made up of Australian Government and state and territory government ministers with responsibility for building policy or regulation.

The ACT's legislation already aligns with many of the recommendations from the National Review. The amendment in the bill relates to recommendation 77, which is that state and territory security of payment legislation should require authorised nominating authorities (ANAs)/adjudicators to provide the regulator with such information as reasonably requested to enable the regulator to monitor the operation of the legislation and activities of ANAs/adjudicators.

The current provisions require ANAs to report information in relation to the ANA's activities and specific information about costs and expenses. The bill amends section 35 of the Security of Payment Act to give the Minister a power to determine other information that must be reported should additional information be reasonably required for purposes related to the operation of that Act.

## **Construction Occupations (Licensing) Act and Construction Occupations (Licensing) Regulation**

The proposed amendments to the *Construction Occupations (Licensing) Act 2004* (COLA) and the *Construction Occupations (Licensing) Regulation 2004* (COLR) are to:

- include provisions for enforceable undertakings in relation to rectifying construction work (rectification undertakings);
- introduce director liability for amounts incurred by a corporation under the Act and operational Acts, and executive officer liabilities in relation to offences for failure to notify automatic suspension grounds;
- allow for rectification orders and occupational discipline to be made in relation to directors and partners of licensed corporations and partnerships;

- allow for the Construction Occupations Registrar to issue a rectification order if made aware of a relevant breach of construction legislation within 6 months before the 10-year period within which the order can be issued expires, if the rectification order is made within one year of the Registrar becoming aware of the contravention;
- clarify that the Registrar does not need to prescribe how work must be undertaken to achieve compliance in a rectification order;
- revise powers in relation to automatic suspension grounds so if after three months the grounds for the suspension still exist, the Registrar can make a reviewable decision to cancel the licence;
- include provision that a licensed corporation or partnership must have a policies and procedures for the effective management and supervision of their nominees and construction services under their licence, including arrangements for regular communication with nominees; and
- clarify provisions in relation to mandatory qualifications, being both academic and non-academic qualifications.

#### Enforceable undertakings for rectification

There are instances where a contravention of the COLA or an operational Act may result in work requiring rectification to bring it into compliance. Before making a rectification order the Registrar must give the relevant licensee (including a former licensee) a written notice of intention (NOI) to make the order and invite submissions about making the order.

At that point some licensees undertake to complete the work as they do not wish to be the subject of a formal rectification order. However, if the Registrar does not make the order and the licensee fails to complete the work, the Registrar may need to start the NOI process again or may be otherwise prevented from issuing a rectification order.

The bill includes provisions for licensees to enter into enforceable rectification undertakings for rectification works, with provisions similar to those in other ACT laws, particularly—

- *Gaming Machine Act 2004* Part 3A Enforceable undertakings
- *Dangerous Substances Act 2004* Part 6.5 Enforceable undertakings
- *Environmental Protection Act 1997* Part 14A Enforceable undertakings
- *Work Health and Safety Act 2011* Part 11 Enforceable undertakings
- *Waste Management and Resource Recovery Act 2016* Part 14 Enforceable undertakings

The main difference between the amendments in the bill and these laws is that the provisions in the bill are intended to lead to the rectification of non-compliant construction services and are linked to rectification order powers in Part 4 of the COLA. While a rectification undertaking may provide for any matters agreed between the Registrar and the entity giving the undertaking, a mandatory inclusion in any rectification undertaking is at least one undertaking relating to the contravention or alleged contravention that will result in the

rectification of the work done in the course of the construction service. This may include that rectification work is arranged or paid for by the entity.

The new provisions (clause 42) provide for the following:

- The Registrar to accept written rectification undertakings, and that the Registrar or a person may suggest draft undertakings before a rectification undertaking is given (new section 47B);
- The things a rectification undertaking must include (new section 47B);
- The requirement for the Registrar to give an entity that proposes a rectification undertaking a notice of decision and reason for the decision (new section 47C (1));
- Information that must be in an acceptance such as information about the effect on entering into an enforceable undertaking, including the consequences of contravening the undertaking (new section 47C (2));
- That a rectification undertaking becomes enforceable when the decision to accept the undertaking is given to the entity or any later date stated by the Registrar (new section 47D);
- The withdrawal or variation of a rectification undertaking, excluding a variation to provide for a different contravention or alleged contravention of the COLA or an operational Act (new section 47E);
- When the Registrar may end a rectification undertaking (new section 47F);
- That giving an undertaking is not an express or implied admission of fault or liability, relevant to deciding fault or liability, or admissible in evidence in a court or tribunal proceeding in relation to the contravention or alleged contravention (new section 47G);
- The Registrar may apply to the Magistrates Court for an order if the Registrar believes on reasonable grounds an entity has contravened an accepted undertaking, if the Registrar has not issued a rectification order or authorised another person to take action in relation to the work stated in the rectification undertaking in relation to the contravention (new section 47H);
- That no proceeding may be brought, and no occupational discipline may be taken, against a person for a contravention or alleged contravention if a rectification undertaking is in effect in relation to that contravention (new section 47I);
- An offence with a maximum penalty of 2000 penalty units for a person failing to comply with a Magistrates Court order in relation to a rectification undertaking (new section 47J (1));
- An offence with a maximum penalty of 2000 penalty units for each partner of a partnership that fails to comply with a Magistrates Court order in relation to a rectification undertaking, including a defence for individual partners (new sections 47J (2) and (3)).

A person could give an undertaking in relation to a contravention that occurred before the commencement of the provisions, including in relation to a notice of intention issued before

the commencement about which the Registrar has not decided to issue a rectification order. The provisions do not affect rectification orders that have been issued before the commencement of the provisions.

While the decision not to accept an undertaking is not reviewable, issuing a rectification order, or taking other formal actions against the entity are reviewable or subject to a tribunal or court of competent jurisdiction.

#### *Relationship with rectification orders*

A submission in relation to a notice of intention may include a rectification undertaking. This does not require the Registrar to accept the undertaking and the Registrar may decide to make a rectification order if appropriate to do so (clause 36).

If a person enters into an enforceable undertaking as a result of a notice of intention and fails to comply with the undertaking, or the undertaking is withdrawn and the Registrar considers that it is appropriate to issue a rectification order, the Registrar may issue a rectification order in relation to the relevant work without having to give a further notice of intention (clauses 35 and 37).

If a person enters into an enforceable undertaking as a result of a notice of intention and fails to comply with the undertaking, or the undertaking is withdrawn and the Registrar considers that it is appropriate to authorise another person to undertake the work under section 37, the Registrar may authorise the person without issuing a further notice of intention.

#### *Register of enforceable undertakings*

The bill also includes a requirement for the Registrar to keep a register of rectification undertakings, similar to provisions in section 98 of the *Waste Management and Resource Recovery Act 2016*, with the addition of the requirement to record any withdrawal or variation to the undertaking.

#### *Publishing information about enforceable undertakings*

COLA provides for a public register of information about licensees. The bill (clause 53) provides that the public register—

- (a) must also include details about any order by the ACAT or a court in relation to a rectification undertaking given by a licensee that has been licensed in the period beginning on the day 10 years before the Registrar most recently updates the register, and accepted by the Registrar; and
- (b) may include any other details about the rectification undertaking if the registrar believes on reasonable grounds that it is necessary or desirable to protect the public.

As the powers relating to rectification undertakings are introduced in this bill, at the commencement of the provisions there will be no existing information relating to rectification undertakings that must be published.

Information about a rectification undertaking included on the public register must be removed from that register if—

- the undertaking has ended and the Registrar no longer believes on reasonable grounds that its inclusion is necessary or desirable to protect the public; or
- the Registrar receives a direction from the ACAT or a court, on application by the licensee who gave, or a person affected by, the undertaking, to remove the information.

The Registrar's decision to include information about a rectification undertaking is a reviewable decision (clause 59). A review can be sought by a licensee who gave the rectification undertaking, or a person affected by the undertaking.

These provisions are discussed further in the *Human Rights Implications* section below.

#### *Consideration in relation to licensing*

The bill also amends sections 19 and 25 of the COLA, which relate to licence applications and licence renewals respectively, to include consideration of whether a person has contravened, or is contravening an enforceable undertaking (however described) under the COLA or a corresponding law in decisions on issuing or renewing a licence. A licence may be refused only if necessary or desirable to protect the public and a decision to refuse or condition a licence remains a reviewable decision.

#### Director and executive officer liability

The Construction Occupations (Licensing) Act and operational Acts provide for sanctions and penalties for contraventions of requirements for carrying out construction services. In some circumstances, such as for occupational discipline and rectification orders, actions may be taken against former licensees as well as current licensees.

It is difficult for an individual licensee to avoid their liabilities. However, the directors of a corporation may avoid the corporation's liabilities by closing the corporation in a variety of ways. In recent matters where the Registrar has moved to require rectification of defective building work, some corporations have responded by winding up. Further, some civil cases brought by owners against builders for defective work have also triggered the closing of the corporation.

Reform 37 in the *Improving the ACT Building Regulatory System* is to consider expansion of rectification and other relevant powers to allow orders to be issued to people closely associated with an insolvent or ‘disappeared’ corporate licensee.

To prevent the actions of directors undermining the intent and operation of the building regulatory system, the bill includes new provisions, which allow certain actions to be taken in relation to directors and executive officers of licensed corporations, and partners of licensed partnerships.

Although there are benefits to the corporate form, it is counter to the principles of corporations law to use a corporate vehicle for personal benefit only to end that vehicle or take other actions to avoid being called to account for any liabilities, or remedies other parties are entitled to. The provisions are intended to facilitate the obligations under ACT building and construction law being met, rather than only including punishments for failing to meet them.

#### *Executive officer liabilities in relation to notifying automatic suspension grounds*

Section 26B requires licensees to give the Registrar written notice of specific events and circumstances linked to the eligibility to hold a licence and to automatic suspension grounds, such as loss of required insurance, having no appointed nominees and bankruptcy and personal insolvency. Failing to notify of the circumstance within 24 hours of the event or the licensee becoming aware of any of the circumstances is an offence with a maximum penalty of 100 penalty units.

Early notification of these events and circumstances is important so that licence status can be updated, there is reduced risk of people continuing to operate under a suspension, and the Registrar can consider or instigate appropriate action if a licensee is no longer eligible to hold a licence.

This bill includes provisions in relation to the notification requirements in section 26B that provides an executive officer of a corporation is taken to commit an offence (also with a maximum penalty of 100 penalty units) if—

- The corporation commits an offence against that section; and
- The officer was reckless about whether the offence would be committed; and
- The officer was in a position to influence the conduct of the corporation in relation to the commission of the offence; and
- The officer failed to take reasonable steps to prevent the commission of the relevant offence.

An executive officer of a corporation, is defined as a person, however described and whether or not the person is a director of the corporation, who is concerned with, or takes part in, the corporation’s management. This does not extend to staff or contractors of a corporation that do not take part in the corporation’s management, such as to be involved in the decision-

making of the corporation. This definition is consistent across the ACT statute book and allows for differences in corporate and organisational structures, titles and responsibilities.

It is reasonable to expect that executive officers, and not only directors, will or may, have knowledge about the corporation's financial position, convictions against the corporation, and appointment of nominees.

In deciding whether things done or omitted to be done by the executive officer constitute reasonable steps, a court must consider any action the officer took directed towards ensuring the following (to the extent that the action is relevant to the act or omission):

- that the corporation arranges regular professional assessments of the corporation's compliance with section 26B;
- that the corporation implements any appropriate recommendation arising from such an assessment;
- that the corporation's employees, agents and contractors have a reasonable knowledge and understanding of the requirement to comply with section 26B;
- any action the officer took when the officer became aware that the relevant offence was, or might be, about to be committed.

The executive officer may have proceedings brought against them, and convicted of an offence whether or not the corporation has had proceedings brought against them, or been convicted of the offence against section 26B. However, the provisions do not apply if the corporation has a defence to a prosecution for an offence against section 26B.

The offence is consistent with nationally-agreed principles for personal fault for directors and officers. It is Type 1 executive responsibility offence, preferred under those principles, and requires the prosecution to prove every element of the offence alleged to have been committed by the executive officer, including the element (the responsibility element) that he or she failed to take all reasonable steps to prevent or stop the commission of the offence by the corporation.

The provisions would apply to a breach of a corporation's notification requirements from the commencement of the provisions only. Further information about the presumption against retrospectivity is in the section titled 'Application and retrospectivity' below.

### *Liability for amounts - directors*

The bill includes provisions (clause 56, new section 126B) similar to those in section 111C, Liability of directors for amounts in the *Queensland Building and Construction Commission Act 1991*, which applying to the following scenarios:

- A corporation is convicted of an offence against a provision of the COLA or an operational Act, a penalty for the offence is imposed on the corporation, and the amount of the penalty is not paid within the time required for its payment.
- The ACAT requires a corporation to pay an amount under section 58 (3) and the amount is not paid within the time required for payment.
- A corporation has a debt owing to the Territory under the COLA or an operational Act and the debt is not paid when it is due.

In these scenarios, the liability to pay the amount owed attaches to each individual who was a director of the corporation at the time the offence was committed, the act or omission that was a ground for the occupational discipline happened, or when the debt was incurred respectively.

It also attaches to each individual who is a director of the corporation when the penalty is imposed, the ACAT made the order for payment under section 58 (3), or when the payment for a debt to the Territory is due.

A liability to pay an amount applies regardless of the status of the corporation, including, for example, that the corporation is being, or has been, wound up. If a liability to pay an amount attaches to two or more people, each person is jointly and severally liable for payment of the amount.

This section does not impose a criminal liability on directors in relation to offences but provides a liability in relation to paying a required penalty arising from a conviction by the relevant court.

The provisions would not apply to amounts incurred but not paid prior to the commencement of the provisions, as this application is not expressly included in the provisions. Further information about the presumption against retrospectivity is in the section titled ‘Application and retrospectivity’ below.

The human rights implications in relation to these provisions are discussed below.

### *Occupational discipline*

The bill includes new provisions in Division 5.2 in relation to occupational discipline.

#### **Applications in relation to partners and directors**

Consistent with the grounds for occupational discipline in section 55, the bill (clause 45) amends that section to provide that in addition to an application in relation to a licensee, an application for occupational discipline may be made in relation to one or more of the following:

- If the licensee is a corporation—a director of the corporation



- If the licensee is a partnership—
  - a partner of the partnership; or
  - a director of a corporation that is a partner of the partnership.

An application can be made whether or not an application has been made in relation to the partnership or corporation and applies whether or not the corporation or partnership still exist when the application is made (clause 46).

An occupational discipline order can be made if the ACAT considers it appropriate and may be made whether or not an order has been made in relation to the partnership or corporation. In deciding an application in relation to a director or partner, the ACAT would need to consider all of the matters in section 57 as they relate to the director or partner.

Directors and partners have the same review and appeal rights as those available to licensees.

### **Orders in relation to directors and partners when no application is made**

The bill provides that if the ACAT is considering an application for occupational discipline in relation to a corporation or partnership licensee, the ACAT may make an occupational discipline order in relation to any of the following whether or not an application for an order has been made in relation to them:

- If the licensee is a corporation—a director of the corporation.
- If the licensee is a partnership—
  - a partner of the partnership; or
  - a director of a corporation that is a partner of the partnership.

However, consistent with existing section 58A (3) in relation to related licensees, to ensure procedural fairness the ACAT must not make an order in relation to a person mentioned above if the related licensee has been given—

- (a) notice of the application for an occupational discipline order in relation to a licensee, and
- (b) notice that the ACAT is considering making an order in relation to the person; and
- (c) the opportunity to make representations to the ACAT in relation to the proposed order.

Provisions in relation to occupational discipline taken against any of the individuals mentioned above apply in the same way they apply to occupational discipline taken against a holder of the licence.

### *Rectification orders – application to directors and partners*

The bill makes amendments that provide that if the Registrar makes an order in relation to an entity (a licensee or former licensee), the Registrar may also make an order in relation to:

- If the licensee is a corporation—a director of the corporation.
- If the licensee is a partnership—
  - a partner of the partnership; or
  - a director of a corporation that is a partner of the partnership.

The Registrar need not avail themselves of this option if they do not consider it appropriate in a particular case.

### **Rectification order – licensee or former licensee wound up after order made**

The bill inserts new provisions in section 39B (clause 41) that apply if the Registrar makes a rectification order in relation to a licensed corporation, and after the Registrar makes the order the corporation becomes the subject of a winding-up order, or a controller or administrator is appointed for the corporation, or the corporation is deregistered.

In this circumstance, the order is taken to have been made in relation to each person who was a director of the entity at or after the time the construction service was provided. Each of these directors had the obligation to prevent or address a contravention by the corporation, and potentially was able direct or influence the corporation in relation to the contravention. Making an order in relation to a person, which includes the order taken to have been made in relation to the person, is a reviewable decision.

Work may include arranging and paying for things to be done if the director does not have the licence, skills or qualifications to undertake the thing.

Further information about the creation of new obligations that may be applied to contraventions for which a rectification order may be made is in the section titled ‘Application and retrospectivity’ below.

### **Rectification order – licensee or former licensee wound up etc before order made**

The bill includes new provisions in section 39A (clause 41) that allow the Registrar to make a rectification order in relation to a director or a licensed corporation if, before the Registrar makes the order in relation to the corporation:

- (a) the corporation becomes the subject of a winding-up order; or
- (b) a controller or administrator is appointed for the corporation; or
- (c) the corporation is deregistered.

The Registrar may issue a notice of intention to the directors of the corporation in the same way as for the corporation. If the Registrar has already issued a notice of intention in relation to the contravention to the corporation, the Registrar must provide a copy to each director and a statement to the effect that the person is invited to make submissions about the making of the order within 28 days after the person receives the notice. The Registrar would not need to withdraw or reissue the original notice.

The Registrar may make a rectification order in relation to a person who was a director of the entity at or after the time the construction service was provided. Each of these directors had the obligation to prevent or address a contravention by the corporation, and potentially was able direct or influence the corporation in relation to the contravention.

The Registrar may make the order after considering any submissions made within the 28 days if satisfied—

- the corporation contravened the COLA or an operational Act; and
- it is appropriate to make a rectification order in relation to the person.

The Registrar may decide it is appropriate to make an order in relation to some, and not all directors.

Making an order is a reviewable decision.

Provisions in relation to an entity for a rectification order apply in the same way to a director as they do to a licensee or former licensee, and a reference to an entity includes a director.

Further information about the creation of new obligations that may be applied to contraventions for which a rectification order may be made is in the section titled ‘Application and retrospectivity’ below.

#### Rectification orders – period in which an order may be issued and content of order

##### *Rectification orders – identification of breach within 10 years*

Under sections 37 and 38 of the COLA, the Registrar may make a rectification order in relation to a licensee, or authorise another party to undertake rectification work at the cost of the licensee, if it is appropriate for a particular contravention of laws covering construction services.

The Registrar may not make a rectification order if satisfied that the act that caused the relevant contravention happened, or ended, more than 10 years before the day the Registrar proposes to make the order.

In some circumstances, a major defect may not manifest until close to the end of the 10-year period. If the Registrar becomes aware of the contravention close to the end of the period,

there is generally insufficient time for the Registrar to investigate the matter, issue a notice of intention, consider submissions and issue the final order before the 10-year period expires.

The bill amends section 35 to allow the Registrar to issue a rectification order –

- if the Registrar becomes aware of a relevant breach of construction legislation within 6 months before the 10-year period the order can be issued expires, or
- if a notice of intention has already been issued in relation to the breach before the 10-year period expires.

For fairness, the Registrar would be required to make the order within one year of the Registrar becoming aware of the contravention, or issuing the notice of intention for those notices issued prior to the end of the 10-year period. The decision to make the order remains reviewable.

In relation to construction services, a contravention of the Act may start on a particular date but be ongoing throughout the provision of the service. The bill also provides that the 10-year period in which an order may generally be issued starts from the later of the day the act that caused the contravention happened or ended; or the day any certificate was issued by the registrar under any of the following provisions of the *Building Act 2004* in relation to the building the subject of the construction service:

- section 69 (Certificates of occupancy);
- section 71 (2) (Certificate for building work involving demolition);
- section 72 (2) (Certificate for building work involving erection of structure);
- section 73 (Certificates of occupancy and use for owner-builders).

The construction services to which certificates under the building work relate includes building services, building surveying services and building assessment services. Where electrical, plumbing, gas-fitting and other services are supplied in conjunction with this work, a certificate for fitness to occupy will generally be issued only if those other services are considered safe. Where other construction services are carried out separately to building work, the certificates mentioned above do not relate to the other construction services.

This means that if a certificate was issued in relation to a building or part of a building subsequent to the provision of the construction service, the date the certificate is issued begins the calculation of the 10-year period for work that relates to the certificate.

The intention is that the certificate from which the 10-year period is calculated is the certificate that relates to the relevant construction service. This is the building as subject to the work, and not the building as subsequently altered or added to. New work on an existing building would be subject to its own rectification period starting from the issue of a relevant certificate. If new work that is not subject to a certificate mentioned in the provisions is carried out on a building subsequent to the issue of a certificate, the date the contravention happened or ended in relation to the new work would start the 10-year period.

### *Rectification orders – clarification on content of rectification order*

The intention of a rectification order is to require a licensee to rectify work so that it meets a particular standard. It is not intended that the rectification order prescribe or detail what work must be carried out, or how the work must be carried out.

In *B & T Constructions (ACT) Pty Ltd v Construction Occupations Registrar and the Owners – Units Plan 3324* [2013] ACTSC 219, Justice Burns stated that “It is important that rectification orders, including ancillary orders, be expressed with sufficient precision that no ambiguity, or opportunity for disagreement as to the effect of the order, arises. This requirement as to the form of the order arises principally from the fact that failure to comply with a rectification order may attract criminal sanctions: s 40 of the COLA”.

This has been interpreted by some stakeholders as requiring the Registrar to set out precise steps for rectification work, such as a full scope of works, and how it must be undertaken rather than to provide a clear indication of the outcome to be achieved.

The bill includes a new provision in section 38 that clarifies that a rectification order need not state how a thing required to be done under a rectification order is to be done (clause 40). A new example includes that an order to rectify a building so that it complies with a stated performance requirement of the building need not include details of how the work is to be undertaken or how the building may need to be redesigned or altered to comply. In this case the outcome that must be achieved to comply with the order is clearly expressed.

This section does not prevent details of how a thing is to be done being included in an order, including if it is necessary to provide sufficient precision about the required effect of the order; for example, prescribing a method of testing or the required qualifications of a person providing an independent verification of the work.

### Licence cancellation after automatic suspension

Division 5.1 of COLA includes grounds for automatic suspensions, which include loss of eligibility because of a conviction for prescribed criminal offences outlined in sections 12 and 15 of the *Construction Occupations (Licensing) Regulation 2004*, bankruptcy or personal insolvency, loss of required insurance, or not having a nominee (for corporations and partnerships). An automatic suspension may also be applied on public safety grounds. Loss of eligibility is also grounds for occupational discipline.

If the Registrar is aware of the grounds for the automatic suspension, and the matter is not resolved, an automatic suspension lasts for three months after the Registrar becomes aware of the ground. If a licence renewal decision cannot be made in this time, the Registrar would need to make an application to the ACT Civil and Administrative Tribunal (ACAT) for an occupational discipline order to continue a suspension or cancel the licence.

The bill includes a new power for the Registrar to cancel a licence that is automatically suspended, if, after three months of the date the Registrar becomes aware of the ground for the suspension, the ground still exists. The Registrar is not required to cancel the licence, but may do so if the Registrar considers it appropriate in the circumstances.

The decision to cancel a licence is reviewable (clause 58), in the same way a decision to refuse a licence application or renewal for ineligibility to hold a licence, or to protect the public because of contraventions in relation to the licence, are reviewable.

These provisions do not relate to any other contravention of the Act, or type of suspension that can be applied under the Act.

### Corporations and partnerships – management of nominees and construction services

A corporation or partnership must have at least one nominee to be eligible for a licence. A nominee is an individual licensee who has responsibilities for supervision and compliance of work carried out under the licence. A nominee's role is to supervise the relevant construction services of the corporation or partnership and ensure the construction work complies with the COLA and relevant operational Acts.

The description of the nominee's role has led to a misconception amongst some licence holders that the nominee has the sole responsibility for the work carried out under the corporation or partnership licence. However, the COLA outlines a system of dual responsibility for licensed corporations and partnerships, and nominees. The nominee supervises the work, and corporation or partnership is responsible for the nominee and their failures.

Specifically, existing section 31 provides for offences for both parties:

- Section 31 (2) provides that the nominee commits an offence if the nominee fails to adequately supervise the relevant construction services, or ensure that the relevant services comply with the COLA and operational Acts (such as the Building Act).
- Section 31 (4) provides for a corresponding offence for the corporation or partnership that the nominee fails to adequately supervise the relevant construction services, or ensure that the relevant services comply with the COLA and operational Acts.

The offences are strict liability.

Section 31 (3) provides a defence for a nominee if they give the corporation or partnership a written requirement to do something, or not do something, in compliance with, or to achieve compliance in relation to the matter that made up the failure; and

- the nominee had given the Registrar a copy of the requirement; and

- the failure would not have happened if the requirement had been complied with.

The section provides no defence for corporations or partnerships, which means they have limited defences to rely on, but may make a defence of mistake of fact. Further, Part 2.5 Corporate criminal responsibility of the *Criminal Code 2002* provides for the failure of a corporation to manage, control, or supervise the conduct of an employee, agent or officer. However, provisions for occupational discipline, demerit points and rectification orders do not expressly outline a similar dual obligation.

There are also responsibilities of corporation and partnership licensees that relate to administrative matters, and not supervision of the physical work. These include notifications for changes in licence details and situations that would affect the eligibility of the entity to hold a licence.

There remains a view amongst some licence holders that as the licence is 'technical' rather than for contracting, and the nominee is the technically skilled party, the corporation cannot reasonably be responsible for the nominee's failures. This is particularly the case if the directors could demonstrate they had no system of control, management or direction over the nominee.

This view is counter to the intent of the law. It also limits the effectiveness of the regulatory system if the corporation or partnership can limit their exposure to action by failing to have a reasonable system of management for work under its licence.

The bill includes new provisions (clauses 27, 28 and 29) that requires that to be eligible for a licence, corporations and partnerships to have written records of policies and procedures for effectively managing and supervising the nominee and their obligations in relation to their licence. The system of management must include arrangements for regular communication with nominees in relation to the construction services provided by the licensee.

The nature of policies and procedures for effective management will be specific to each entity and their projects, as well as the role of the nominee in the business, such as whether the nominees are directors or employees.

New section 28 (3A) provides that a failure of the corporation or partnership to have the policies and procedures is not a reasonable excuse to prevent the following in relation to the corporation or partnership licensee—

- making a rectification order;
- taking occupational discipline;
- imposing a condition on the licence under section 21 (Licence conditions);
- recording demerit points under section 91; or
- taking any other action under the Construction Occupations (Licensing) Act or an operational Act.

The new provisions do not affect any procedural requirements, or review or appeal rights in relation to actions taken in relation to the licensee.

These provisions commence on a day fixed by the Minister, but not longer than six months after the notification day, which allows corporations and partnerships that do not have currently an appropriate system of management to put a system in place.

### Description of qualifications for licence eligibility

Section 18 (1) of the Act provides that the regulations may prescribe when an entity is eligible to hold a licence including the qualifications the entity must have.

The term ‘qualification’ takes the broad dictionary meaning, which includes a quality or accomplishment which fits for some function, or a required circumstance or condition for acquiring or exercising a right or holding an office or the like. It does not refer only to academic qualifications, and is intended to cover a range of requirements including assessments and examinations. However, the examples for subsection (2), which relates to how an applicant must demonstrate the applicant satisfies a requirement in relation to an application, may imply that a qualification does not include passing a practical or written assessment.

Practical assessments are a feature of both builder and building surveyor licence eligibility requirements, and so are required not only as a method of assessment, but to be eligible for a licence.

The bill amends section 18 to avoid the implication that a qualification excludes other forms of assessment for the purposes of eligibility by removing the existing examples (clause 23). The bill also relocates provisions in subsection 18 (2), which relates to what an applicant may or must demonstrate in relation to an application for a licence to section 17, which relates to applications (clause 22). The amendments do not affect the existing qualification declarations made under section 18.

### **Regulatory Impact Analysis**

Section 34 of the Legislation Act requires that if a proposed subordinate law is likely to impose appreciable costs on the community, or a part of the community, then, before the proposed law is made, the Minister administering the authorising law must arrange for a regulatory impact statement (RIS) to be prepared for the proposed law.

This bill amends the *Construction Occupations (Licensing) Regulation 2004*.



Section 36 of the Legislation Act provides for when the preparation of regulatory impact statement is unnecessary. A RIS for amendments to subordinate law proposed in this bill is unnecessary because the amendments relate only to reviewable decisions either changed consequentially, or included in relation to new provisions in the Act.

*General impact of the bill and amendments to primary legislation*

The proposed amendments to the Architects Act are administrative only, but may allow for more efficient conduct of Architects Board functions.

The amendment to the Building and Construction Industry (Security of Payment) Act provides for the Minister to make a notifiable instrument determining information that must be reported. The provision enables a determination but does not itself impose specific reporting requirements.

The proposed amendments to the Building Act and Construction Occupations (Licensing) Act are not expected to impose an appreciable cost on a sector of society. They do not impose new standards for provision of construction services.

Licensees operate under an existing framework that includes obligations to comply with relevant laws and there is both an industry and community expectation that licensees will meet their obligations. This includes that they will have policies and procedures for the effective management and supervision of their nominees and construction services under their licence, and for compliance with their obligations.

New powers and proposed liabilities are not expected to impose additional costs as they do not change the underlying obligations in relation to contraventions of relevant laws. These changes to powers will affect only those licensees or their associated entities with a history of non-compliance with relevant laws in the ACT or other jurisdictions. The provisions for automatic suspensions apply when a person is no longer eligible to hold a licence. Many of the new provisions apply only to licensees that have breached their obligations. The offence provisions for reporting requirements in the COLA do not impose new reporting requirements on a corporation.

New provisions to give building certifiers the ability to request a broader range of certificates from engineers in relation to matters of safety, health, and amenity that may affect whether a building is fit for occupation and expressly provide for practices already undertaken informally by certifiers. The provisions do not mandate that certificates must be obtained.

The Government's Triple Bottom Line Assessment Framework requires an assessment of climate change impacts for government bills or for major policy proposals. A statement of effects must be included in the explanatory statement for the relevant bill. The climate change impacts of this bill have been considered and potential impacts are expected to be

indirect but positive. Building laws include standards for new building work that are intended to reduce energy use and greenhouse emissions from the operation of buildings. Amendments to improve compliance processes may help to ensure these standards are effective.

The proposed law is consistent with the policy objectives of the regulatory framework for construction occupations licensing, building inspection, carrying out of building work, occupational discipline, security of payments, statutory protections for the construction industry already in place. This law exists to provide reasonable protections and responds to the substantial financial and safety risks to industry members, building occupants, users of building services and the general public inherent in construction work.

## **Offences and penalties**

The bill includes new offences in relation to:

- Building Act, new section 53A, for moving, altering, damaging, defacing, covering or preventing access to a sign displayed on or near a parcel of land in relation to a stop notice without the authorisation of the Construction Occupations Registrar; a strict liability offence with a maximum penalty of 50 penalty units.
- Building Act, new section 133A, for failing to comply with a direction given by a building inspector, with a maximum penalty of 50 penalty units.
- Construction Occupations (Licensing) Act, new section 26C, which provides that an executive officer is taken to commit an offence in certain circumstances if the corporation commits an offence against section 26B *Notification requirements for licensees* for failing to notify the Registrar of certain circumstances that would make a licensee ineligible to hold a licence, with a maximum penalty of 100 penalty units.
- Construction Occupations (Licensing) Act, new section 47J, for failing to comply with a Magistrate's Court order in relation to an enforceable rectification undertaking with a maximum penalty of 2000 penalty units.

### *Justification of penalties*

The proposed offences and penalties are warranted for the following reasons when considering the Territory's *Guide for Framing Offences*:

1. At its highest function, the services covered by the Act are regulated to protect the public.
2. If a person moves, alters, damages, defaces, covers or prevents access to a sign displayed on or near a parcel of land in relation to a stop notice, when that notice may be placed only if necessary or desirable to protect the public, without the authorisation of the Construction Occupations Registrar can detrimentally affect public safety.

3. A sign displayed for the protection of the public is likely to be displayed securely and not in a way that can be accidentally interfered with.
4. Failing to comply with a direction in relation to an unsafe building or non-compliant building work is an obstruction of enforcement of the Building Act, and may have serious consequences for the safety or health of building occupants.
5. Operating whilst ineligible to hold a licence undermines the protections intended by the construction licensing system.
6. A person can avoid a rectification order or other regulatory action in relation to a contravention of the Construction Occupations (Licensing) Act and operational Acts by entering into a rectification undertaking, and failure to comply with the undertaking should not be used to obstruct enforcement of the relevant Acts.
7. Contravening the Construction Occupations (Licensing) Act and operational Acts, can lead to people suffering preventable detrimental impacts on their safety, health, and amenity, financial losses, and can undermine the regulatory scheme.
8. The consequences of not complying with procedures and technical standards for work can be high and include serious injury or death to workers, building occupants and members of the public.
9. The penalties reflect the relative seriousness of the particular offences within the legislative scheme and the level of responsibility carried by the people falling within the obligation.

The penalties for offences are commensurate with like or related provisions in related Acts.

- The maximum penalty for interfering with a sign in relation to a stop notices is 50 penalty units, which matches the level of existing offences in relation to interfering with something containing a thing seized because of the risk to the health or safety of people, in a range of Acts including under the Building Act and COLA.
- The maximum penalty for failing to comply with a direction given by a building inspector is 50 penalty units. This is the same penalty as for similar provisions in the *Electricity Safety Act 1971*, the *Gas Safety Act 2000* and the *Water and Sewerage Act 2000*, but does not include the imprisonment option available in relation to provisions in the Electricity Safety and Gas Safety Acts. It is also commensurate with other penalties for offences for not taking reasonable steps to comply with a requirement of an inspector to help with exercising the inspector's functions in the COLA and certain operational Acts (Building Act, Electricity Safety Act, Gas Safety Act, and the Water and Sewerage Act).
- The financial penalty for executive officer criminal liability under new section 26C COLA in relation to a corporation failing to notify the Registrar of circumstances that make the licensee ineligible to hold a licence in section 26B, are set at the same level as for the corporation under section 26B. These offences in turn are the same as for an auditor or actuary failing to notify of insolvency or a contravention of requirements

covering fidelity funds, but do not include the imprisonment component of the penalty.

- The maximum penalty for failing to comply with a Magistrate’s Court order in relation to an enforceable rectification undertaking is 2000 penalty units is the same maximum penalty as the offence for intentionally failing to comply with a rectification order. The potential consequences for not rectifying work are the same regardless of whether the responsible person voluntarily enters into an undertaking or is issued a rectification order.

The amendments in the bill are intended to improve the operation of construction legislation and give the regulator sufficient options to effectively administer the relevant Acts.

Standard defences available in the *Criminal Code 2002* apply to these offences.

### **Human Rights Implications**

Provisions in this bill may engage and limit the right to privacy and reputation, rights in criminal proceedings the right to presumption of innocence. These limitations are addressed below.

#### Privacy and reputation

Section 12 of the *Human Rights Act 2004* states that:

Everyone has the right—

- (a) not to have his or her privacy, family, home or correspondence interfered with unlawfully or arbitrarily;
- (b) not to have his or her reputation unlawfully attacked.

The following provisions of the bill may engage these rights:

- **Building Act**
  - Clauses 17 and 18, New sections 53A and 59A – which provide for display of signs and publication of certain information about stop notices.
  - Clause 19, New section 133A – which provides for a building inspector to give a written direction to an occupier of a building or premises not to use the building or premises, or part of it until it is made safe.
- **Construction Occupations (Licensing) Act**
  - Clause 52, New section 107A (aa) – which provides that details of any cancellation as a result of a continuing ground for an automatic suspension must be included in the public register of information about licensees.
  - Clause 53, New section 107A (7) and (8) – which provides for publication of certain information about rectification undertakings.

### *Importance and purpose of limitation*

Actions under the Building Act and COLA are regulated primarily because of their capacity to impact on the public protections, safety, health and amenity of the occupants and users of buildings.

The provisions relating to display of signs, publication of information about stop notices, and publication of information about rectification undertakings and licence cancellations relate to protecting public safety and protecting the public from poor building practices.

A written direction may include a direction to a resident of a building, and may restrict their use of that building, in circumstances where a building inspector believes on reasonable grounds that building work is not compliant or is not safe. Use may include occupation of a particular area, or operation of a particular building element or installation in the building. This is important to protect occupants, and future occupants, of buildings.

### *Nature and extent of the limitation*

The extent to which privacy is limited and whether interference in relation to a person's home is permissible depends on the context and whether there is an expectation of privacy.

The register of stop notices must include the names of people to whom a stop notice has been issued. This may be a licensee, a person operating a business, a landowner, or a member of the public that does not generally operate a business in the building industry. The Registrar must not make available to the public personal information, or other information about a stop notice, if satisfied it is not necessary or desirable to protect the public or believes it would be inappropriate or illegal to disclose the information. This may include that the disclosure is not compatible with information privacy principles or with the Registrar's obligations under the Human Rights Act.

As the purpose of publishing information is to protect the public, the Registrar may publish information about stop notices that are, or may be, subject to a review or appeal. However, this information must be updated if the stop notice is lifted and publishing the information is no longer necessary or desirable to protect the public, or the ACAT or court has directed the registrar to remove the information from the register.

For information about rectification undertakings in the public register of licensees, the Registrar may include any details about the rectification undertaking if the Registrar believes on reasonable grounds that it is necessary or desirable to protect the public. As the undertaking is not an admission of liability or guilt, the Registrar's decision to include information about a rectification undertaking is a reviewable decision. A review can be sought by a licensee who gave the rectification undertaking, or a person affected by the undertaking.

Further, information about a rectification undertaking included on the public register must be removed from that register if the undertaking has ended and the Registrar no longer believes on reasonable grounds that its inclusion is necessary or desirable to protect the public. Information must also be removed if the Registrar receives a direction from the ACAT or a court, on application by the licensee who gave, or a person affected by, the undertaking, to remove the information.

The public register must include the details of any cancellation under division 5.1, including the date of the cancellation and the reason for the cancellation. The Registrar need not wait for the time in which an application for a review of the decision can be made, or the outcome of a review, to publish the information as the intent of the public register is to provide information to protect people who have engaged, or may engage, licensees. However, under existing 107 (2) (c) and (d), the Registrar must update the public register by not later than the end of the next working day after the day when a licensee's cancellation is lifted, overturned or expires, or the Registrar receives a direction from ACAT or a court about recording or removing information from the register.

In relation to building work in progress, there is a reasonable expectation that access to a building may be restricted. It should be noted that in many instances, it will be the occupant or landowner that requests an investigation or lodges a complaint about building work and so may invite an inspection of the work. While a written direction may restrict the use of an occupied building, or part of the building, this can only be in circumstances where that work does not comply with the Act (which includes standards for safety, health and amenity of occupants) or the building inspector believes it to be unsafe. Importantly, a building inspector does not have the power to require an occupant to evacuate the building. An occupant can also take appropriate action to make the relevant part of the building safe. This bill does not give additional rights of entry to building inspectors.

Section 12 of the Human Rights Act includes a qualifier that privacy is not to be interfered with 'unlawfully or arbitrarily'. The impacts on privacy and the home in this instance are not arbitrary as the bill clearly outlines when a written direction can be made and the limits on the relevant powers (i.e. that it cannot require the evacuation of people from premises).

Section 40B of the Human Rights Act also applies to the exercise of these powers. The Registrar and building inspectors are public authorities and therefore must give proper consideration to a relevant human right in making a decision.

The provisions apply in connection with a building approval obtained by the landowner or building work or buildings that may be unlawfully constructed or pose a risk to the safety of occupants or the public. The interference is reasonable in this context and the impacts are necessary to effectively administer the legislation.

### *Relationship between the limitation and its purpose*

The inspection powers are in place to enforce legislation. Work carried out, and information provided, by and in relation to industry practitioners is relied on by building owners and clients to make informed choices. The construction industry is regulated primarily because of the capacity of construction work to impact the life safety, health and amenity of workers, the public and the eventual occupants and users of buildings and other structures. Regulation of the industry, and of buildings, is in response to the high risks associated with the work.

### *Any less restrictive means available to achieve the purpose*

There are no other, less restrictive ways to achieve the required purpose. The powers outlined above represent the minimum necessary activities that are reasonably required to enforce compliance with the relevant Acts, and protect the public and its safety. They do not create excessive powers and are consistent with powers in a range of Territory Acts.

### Fair trial and presumption of innocence

Section 21 (1) of the Human Rights Act (HRA) states that everyone has the right to have criminal charges, and rights and obligations recognised by law, decided by a competent, independent and impartial court or tribunal after a fair and public hearing.

Section 22 (1) of the HRA states that everyone charged with a criminal offence has the right to be presumed innocent until proved guilty according to law.

The following provisions may engage these rights:

- Construction Occupations (Licensing) Act
  - Clause 26, New section 26C – which provides an executive officer of a corporation is taken to commit an offence (also with a maximum penalty of 100 penalty units) in relation to a corporation’s offence against notification requirements in section 26B in certain circumstances;
  - Clause 56, New section 126B – which provides that directors of corporations become liable for amounts incurred by corporations in certain circumstances.

The strict liability provisions in clause 17 may also engage the right to the presumption of innocence.

Human rights may be subject only to reasonable limits set by Territory laws that can be demonstrably justified in a free and democratic society. In effect, s 28 of the HRA requires that any limitation or restriction of rights must pursue a legitimate objective and there must be a reasonable relationship of proportionality between the means employed and the objective sought to be realised.

### *Importance and purpose of limitation*

The construction industry is regulated primarily because of the capacity of construction work to impact on the life safety, health and amenity of workers, the public and the eventual occupants and users of buildings and other structures. Regulation of the industry is in response to the risks associated with the work. There is a need to preserve public confidence in the regulatory system and its effectiveness.

The strict liability offence is important and contributes to the need to maintain the integrity of the regulatory scheme and uphold regulatory powers to seek compliance.

### *Nature and extent of the limitation*

The extent to which the presumption of innocence is limited and whether such interference is permissible depends on the context for any limitation. The offences for interfering with a sign displayed to protect public safety apply to any person. Offences in relation to a corporation's failure to notify prescribed circumstances apply only to executive officers. Liability for amounts not paid by a corporation when due apply only to certain directors of the corporation.

As noted in *R v Wholesale Travel Group Inc* [1991] 3 SCR 154 recognises that “*The licensing concept rests on the view that those who choose to participate in regulated activities have, in doing so, placed themselves in a responsible relationship to the public generally and must accept the consequences of that responsibility. Therefore, it is said, those who engage in regulated activity should ... be deemed to have accepted certain terms and conditions applicable to those who act within the regulated sphere.*”

Participants in the construction industry have a clear understanding that this is, and has long been, a regulated industry. It should also be noted that licensees can be individuals, partnerships or corporations. As human rights considerations apply only to individuals, care needs to be taken that provisions do not subject individual and non-individual licensees to different regulations, offences and penalties, or create an unfair system for individuals operating as licensee in their own right and outside a corporate form.

This bill includes provisions in relation to the notification requirements in section 26B that provides an executive officer of a corporation is taken to commit an offence (also with a maximum penalty of 100 penalty units) if—

- The corporation commits an offence against that section; and
- The officer was reckless about whether the offence would be committed; and
- The officer was in a position to influence the conduct of the corporation in relation to the commission of the offence; and
- The officer failed to take reasonable steps to prevent the commission of the relevant offence.



Notification requirements in section 26B apply only in relation to circumstances that prevent a corporation from operating as licensee, and to circumstances an executive officer may reasonably be aware of. The offence for executive officers includes a mental element of recklessness and applies only if the officer was in a position to influence the conduct of the corporation in relation to the commission of the offence.

The offence does not apply if the corporation has a defence to a prosecution against 26B. The executive officer has only an evidential burden in relation to the corporation's defence. An evidential burden means that a defendant need only point to evidence that suggests a reasonable possibility that the matter in question exists. It is lower than a legal burden and is less of a limitation on the presumption of innocence. The prosecution must then disprove the existence of any defence beyond reasonable doubt.

The provisions that apply liability to directors for amounts owed by a corporation apply only if the corporation has failed to pay the amount. The liability to pay the amount owed attaches to each individual who was a director of the corporation at the time the offence was committed, the act or omission that was a ground for the occupational discipline happened, or when the debt was incurred respectively. It also attaches to each individual who is a director of the corporation when the penalty is imposed, the ACAT made the order for payment under section 58 (3), or when the payment for a debt to the Territory is due. This is because it is those directors who are in a position to ensure the amount is paid and avoid the personal liability. If a person becomes a director after the amount is incurred, it is expected that they will have exercised due diligence before agreeing to become a director and have a clear understanding of the liabilities of the corporation, and their own potential liabilities.

A liability to pay an amount applies regardless of the status of the corporation, including, for example, that the corporation is being, or has been, wound up. If a liability to pay an amount attaches to two or more people, each person is jointly and severally liable for payment of the amount.

The provisions do not impose a criminal liability on directors in relation to offences, or hold individual directors responsible for contraventions that led to the corporation being required to pay an amount. It provides a liability in relation to paying a required penalty arising from a conviction by the relevant court, or occupational discipline decided by the ACAT. Nothing in the provisions affects rights in relation to court and tribunal proceedings or review and appeal mechanisms for the relevant offences and applications for occupational discipline in relation to the corporation. Any amounts imposed by a court or ACAT will have already been subject to consideration by that body. Where other amounts have been incurred as part of a process for which there is no review, if a civil proceeding is brought to recover the debt to the Territory, a director may make submissions in relation to their liability. If there are exceptional circumstances, section 131 of the *Financial Management Act 1996* provides that the Treasurer may, in writing, on behalf of the Territory:

- waive the Territory’s right to payment of an amount payable to the Territory; o
- postpone any right of the Territory to be paid a debt in priority to another debt; or
- allow the payment by instalments of an amount payable to the Territory; or
- defer the time for payment of an amount payable to the Territory.

To facilitate consistency with the HRA, strict liability offences only impose an evidential burden on the defendant. Strict liability offences do not lead to a reversal in the onus of proof. Such offences require the prosecution to prove the elements of the offence beyond reasonable doubt. It is then open to a defendant to raise defences and to bear an evidential burden only as to their existence. Further, if strict liability applies, defence of mistake of fact and other defences under the Criminal Code may be available.

*Relationship between the limitation and its purpose*

Compliance with requirements for corporations is related to a business context and is in place to ensure that construction services comply with relevant health, safety, environmental protection and amenity standards, and that the public can have confidence in the regulatory system in place to protect it. Interference with a sign displayed to protect the public undermines that protection. In each instance the duty holder knows, or ought to know, their legal obligations.

*Any less restrictive means available to achieve the purpose*

Other, less restrictive ways are not likely to achieve the required purpose. In the case of corporations that no longer exist to fulfil their obligations, actions in relation to those in control of the corporation are the only available alternative.

**Strict Liability Offences**

The bill contains one strict liability offence in the Building Act, new section 53A, for moving, altering, damaging, defacing, covering or preventing access to a sign displayed on or near a parcel of land in relation to a stop notice without the authorisation of the Construction Occupations Registrar; a strict liability offence with a maximum penalty of 50 penalty units.

The offence incorporating strict liability elements has been carefully considered. The strict liability offence arises in a regulatory context where, for reasons of public safety, the public interest in ensuring that the regulatory scheme is observed requires the sanction of criminal penalties.

In particular, where a defendant can reasonably be expected, because of his or her professional involvement, or because of identified restrictions on a premises, to know what the requirements of the law are, the mental (or fault) element can justifiably be excluded. The rationale is that people who are in control of a site, or conducting aspects of building or related work in their professional capacity, or who can reasonably determine that a sign

relates to the need to protect public safety, can be expected to be aware of their duties and obligations not to interfere with the sign.

The designation of strict liability offences restricts fault liability, a fundamental protection of the criminal law and is, therefore, a decision not taken lightly. The use of such offences was justified on the creation of the relevant offence in the Building Act. The strict liability offence is needed to ensure that every relevant person complies with their obligations at all times and acts appropriately for the protection of public safety. The regulatory regime established for this purpose seeks to encourage a culture of compliance.

The offences in the bill designated as strict liability meet the criteria sets out in the ACT Government Directorate of Justice and Community Safety's Guide for Framing Offences (April 2010). In relation to a sign placed to protect public safety, the duty holder knows, or ought to know, their legal obligations.

### **Application and retrospectivity**

There are no retrospective provisions in this bill. All provisions commence on the day or after the notification day for the provisions. The bill does not make conduct that was not a criminal offence or contravention under Territory law when it was carried out in the past, a criminal offence or contravention under this law.

All provisions in the bill apply prospectively. A statutory provision is not retrospective simply because it relies on conduct or events that happened before the provision existed. Legislation only operates retrospectively if it provides that rights and obligations are changed with effect prior to the commencement of the legislation. This is not the case with the bill, as the amendments commence after the bill is notified and create new obligations and liabilities that apply from the date the amendments commence.

The term 'retrospectivity' does cause some confusion where a law that operates on and from its commencement date applies new consequences to actions or events that occurred prior to the law's commencement. This is because there is a fine distinction between legislation having prior effect on past events (i.e. retrospective effect) and legislation basing future operation on past events (e.g. the Bill), which does not have retrospective effect. This was outlined in *Coleman v Shell Co of Australia Ltd* (1943) 45 SR (NSW) 27 (Coleman) at 31 per Jordan CJ:

...as regards any matter or transaction, if events have occurred prior to the passing of the Act which have brought into existence particular rights or liabilities in respect of that matter or transaction, it would be giving a retrospective operation to the Act to treat it as intended to alter those right or liabilities, but it would not be giving it a retrospective operation to treat it as governing the future operation of the matter or transaction as regards the creation of further particular rights or liabilities.

In the context of the Bill, the provisions relating to liability of executive officers (cl 26), rectification orders (cl 41), rectification undertakings (cl 42), occupational discipline (cl 51)

and directors liability for amounts (cl 56), create new liabilities that can only be imposed after the commencement of the amendments in relation to actions or events that took place before or after the commencement of the amendments. In line with the Coleman principle above, this is ‘governing the future operation of the matter or transaction as regards the *creation of further particular ... liabilities*’ (emphasis added) and is therefore *not* retrospective in operation. For example, corporations and their directors have existing obligations in relation to contraventions of a corporation. A rectification order made in relation to a director subsequent to the commencement of the provisions would create a further particular obligation to comply with the order.

Further, it has been held that it is lawful to impose fresh obligations on an existing class of persons (i.e. the existing licensees under the Act), and such a provision does not operate retrospectively merely because it changes the existing rights or duties of that class of persons: *Dubbo Base Hospital v Jones* [1979] 1 NSWLR 225 per Moffit P, Reynolds and Mahoney JJA.

This means that while certain new powers can be exercised in relation to contraventions of relevant laws that occurred prior to the notification day may be perceived to be retrospective, they are not retrospective.

In relation to the new liabilities such as those imposed in relation to liability for amounts (new section 126B, COLA) and for failures to notify particular circumstances (new section 26C, COLA), principles of interpretation include a presumption against retrospectivity unless a retrospective application is expressly included in the relevant provisions. Since no such express intent is included, the application of the provisions would relate to contraventions that occur after the commencement of the provisions only. That is failures to pay an amount due after the commencement, and failures of the corporation to notify as required occurring after commencement.

Each provision that is not retrospective need not expressly state it is not retrospective, and it is not practice to include such statements.

With the exception of the provisions relating to the period in which a rectification order can be issued, which provides for an order to be issued after the existing period in limited circumstances, nothing in this bill change existing liability periods or statutes of limitation.

## Clause Notes

### Part 1 Preliminary

#### Clause 1 Name of Act

This clause provides that the name of the Act is the *Building and Construction Legislation Amendment Act 2019*.

#### Clause 2 Commencement

This clause provides for the commencement of the Act for all provisions other than those in the sections mentioned in subsection (2) on the day after its notification day. The postponed sections 27-29 are in relation to corporation and partnerships with a construction occupations licence having a system of effective management in place in relation to their nominees to be eligible to hold a licence.

Sections mentioned in subsection (2) will commence on a day fixed by the Minister by written notice. The provisions will automatically commence once 6 months have elapsed from the date of notification in accordance with the Legislation Act, Section 79, *Automatic commencement of postponed law*.

#### Clause 3 Legislation amended

This clause provides that the legislation mentioned in the clause is amended by the Act.

### Part 2 Architects Act 2004

#### Clause 4 Section 69A

This clause substitutes a new section 69A that provides for the Board to delegate any of its functions to the registrar appointed under the Architects Act, instead of the current provisions, which restrict delegations to only certain decisions in relation to registration renewals.

The Board is not obliged to delegate its functions, and cannot delegate its functions to any party other than the registrar or the power to delegate. Delegating a function does not prevent the Board exercising the function.

**Clause 5      Calling board meeting  
New section 75 (4) and (5)**

Clause 5 includes provisions similar to those in place for other government bodies to permit the chairperson to decide to hold a meeting using methods of communication that allow Board members to hear what other members are saying without being physically in each other's presence.

This provision provides the chairperson with the option of another form of meeting if suitable for the conduct of the meeting.

**Part 3            Building Act**

**Clause 6      Appointment of certifiers—work not begun  
Section 19**

**Clause 7      New section 19 (2)**

Clause 6 substitutes *must* in place of *may* in the existing provision in section 19. Clause 7 inserts a new subsection (2), which provides that the requirement to appoint a certifier does not apply to building work exempt from requirements for the appointment of a certifier, a building approval, a commencement notice and inspections at prescribed stages of building work.

These clauses do not change the nature of the existing requirements, but are intended collectively to clarify that unless building work is exempt from requiring a building certifier to exercise functions in relation to the work, a certifier must be appointed for the work.

The provisions do not suspend an approval or work if it is outside a mandatory approval/inspection point and a certifier is not appointed to allow for situations where there is an unexpected loss of eligibility of a certifier.

**Clause 8      Appointment of certifiers—work begun  
New section 19A (1) (c)**

**Clause 9      Section 19A (2)**

Clause 9 substitutes *must* in place of *may* in the existing provision in section 19A (2). Clause 8 inserts a new subsection (1) (c), which provides that the requirement to appoint a certifier does not apply to building work exempt from requirements for the appointment of a certifier, a building approval, a commencement notice and inspections at prescribed stages of building work.

These clauses do not change the nature of the existing requirements, but are intended collectively to clarify that unless building work is exempt from requiring a building certifier to exercise functions in relation to the work, a certifier must be appointed for the work.

The provisions do not suspend an approval or work if it is outside a mandatory approval/inspection point and a certifier is not appointed to allow for situations where there is an unexpected loss of eligibility of a certifier.

**Clause 10      Requirements for carrying out building work**  
**Section 42 (1) (d)**

This clause amends section 42 to clarify that if a building approval is required for building work, the work cannot be undertaken without approved plans and must be undertaken in accordance with approved plans.

**Clause 11      Section 47 heading**  
**Clause 12      Section 47 (1)**

Clause 12 provides for building certifiers to request a greater range of expert engineering advice in relation to matters of safety, health and amenity of a building that may affect whether the building as erected or altered is fit for the purposes of occupation and use it is intended to.

There is no change to the requirement that a certifier may request a certificate only if satisfied on reasonable grounds that its 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 (or part) that is being, or has been, erected or altered.

Clause 11 makes a consequential amendment to the heading of the section, which currently refers only to structural engineers.

**Clause 13      Completion of building work**  
**Section 48 (3) (i)**

This clause makes a consequential amendment reflecting the amended title of section 47 (clause 11).

**Clause 14      Section 48 (3) (j)**

This clause makes a consequential amendment to section 48 (3) (j), which will continue to relate specifically to engineers certificates for structural sufficiency, soundness and stability (see clause 12).

**Clause 15**      **Complying with building code**  
**Section 49 (4) (b)**

**Clause 16**      **Section 49 (4), example**

Clause 15 and 16 make technical amendments to section 49 (4) (b) and the note, which replaces the term *alternative solution* with the term *performance solution*.

These terms are derived from the Building Code of Australia published by the Australian Building Codes Board. In that document, the term ‘alternative solution’ has been replaced with the term ‘performance solution’. The concept it describes, being a solution to meet a performance standard that is not prescribed or ‘deemed-to-satisfy’ the standard, remains the same.

**Clause 17**      **New section 53A**

This clause inserts a new section 53A, which provides that the construction occupations registrar may display a sign on or near the parcel of land, stating that a stop notice has been issued in relation to building work on the parcel of land, if satisfied on reasonable grounds that it is necessary or desirable to protect the public. A sign under this section must comply with any requirement prescribed by regulation. There are no regulations proposed for notices in this bill.

New subsection (4) also inserts a corresponding strict liability offence with a maximum penalty of 50 penalty units for a person who moves, alters, damages, defaces, covers or prevents access to a sign without the Registrar’s authorisation. This is important as the sign is displayed to protect the public, and interfering with the sign can affect this protection.

Further information on this offence is in the *Offences* section of this explanatory statement.

**Clause 18**      **New section 59A**

Clause 18 inserts new requirements the Registrar to keep a register of stop notices issued in the period beginning on the day 10 years before the Registrar most recently updates the register, if the information is available. This register is separate to licence registers as a stop notice may be issued to other parties than licensees, and may not relate to a contravention by a licensed builder.



New section 59A also provides that the Registrar may make public information in the register if satisfied that publishing the information is appropriate and necessary or desirable to protect the public. This applies to notices issued in the previous 10 years.

The register must include the names of people to whom a stop notice has been issued. This may be a licensee, a person operating a business, a landowner, or a member of the public that does not generally operate a business in the building industry. The Registrar must not make available to the public personal information, or other information about a stop notice, if satisfied it is not necessary or desirable to protect the public or believes it would be inappropriate or illegal to disclose the information. This may include that the disclosure is not compatible with information privacy principles.

As the purpose of publishing information is to protect the public, the Registrar may include publish information about stop notices that are, or may be, subject to a review or appeal. However, this information must be updated if the stop notice is lifted and publishing the information is no longer necessary or desirable to protect the public, or the ACAT or court has directed the registrar to remove the information from the register.

Further discussion of these provisions is in the *Human Rights Implications* section of this explanatory statement.

#### **Clause 19      New division 7.2A**

This clause inserts a new division 7.2A that gives building inspectors powers to give written directions in certain circumstances in relation to non-compliant buildings and building work. The powers in new section 133A can require that a building or part of a building is not used until it is made safe and complies with the Building Act but cannot be used to require the evacuation of a building.

There are other powers in the Building Act that relate to occupancy and stopping building work, and powers in the Emergencies Act to evacuate or close premises that can be exercised if required.

Failing to comply with a written direction is an offence carrying a maximum penalty of 50 penalty units.

#### **Clause 20      Giving copies of documents New section 145 (2) and (3)**

This clause includes provisions to make access to building plans that relate to the obligations of an owners corporation simpler for the owners corporation to access. It does not authorise the provision of identifying information in relation to unit proprietors that may be found in

the plans and documents attached to plans, other than the proprietors' names. For information to be provided to an owners corporation manager, the owners corporation must have given the manager the written authority to have the plans.

#### **Part 4 Building and Construction Industry (Security of Payment) Act**

##### **Clause 21 Report—authorised nominating authority Section 35 (2)**

This provision includes an amendment that enables the Minister to determine in writing information that authorised nominating authorities must report. A determination is a notifiable instrument, which must be made in accordance with the relevant provisions for subordinate law in the Legislation Act.

#### **Part 5 Construction Occupations (Licensing) Act**

##### **Clause 22 Licence applications New section 17 (3A)**

Clause 22 relocates provisions in existing subsection 18 (2), which relates to what an applicant may or must demonstrate in relation to an application for a licence to section 17, which relates to applications.

##### **Clause 23 Eligibility for licence Section 18 (2) and examples and note**

This clause removes the examples in section 18 to avoid the implication that the term qualification excludes other forms of assessment other than academic qualifications for the purposes of eligibility. This clause also omits section 18 (2), which is relocated to new section 17 (3A) by clause 22.

##### **Clause 24 Decision on licence application New section 19 (4) (a) (via)**

This clause provides that the registrar may consider whether an applicant or a director, nominee or partner of an applicant, has contravened a rectification undertaking (however

described) under the Construction Occupations (Licensing) Act or a corresponding law, in determining whether to grant a licence. This aligns with the new rectification undertaking provisions in new Division 4.3 (clause 42), and is important to link a person's compliance history with their ongoing ability to hold a licence.

In all cases the Registrar may only refuse to issue the applicant a licence if he or she believes it is necessary or desirable to protect the public. This means that the contravention in relation to the applicant must be of sufficient concern that the applicant should not hold a licence, not that a licence can be refused based on minor infractions.

A decision to refuse a licence remains a reviewable decision.

**Clause 25      Licence renewal**  
**New section 25 (3) (a) (iiia)**

This clause provides that the Registrar may consider whether an applicant or a director, nominee or partner of an applicant, has contravened a rectification undertaking (however described) under the Construction Occupations (Licensing) Act or a corresponding law, in determining whether to renew a licence. This aligns with the new rectification undertaking provisions in new Division 4.3 (clause 42), and is important to link a person's compliance history with their ongoing ability to hold a licence.

In all cases the Registrar may only refuse to issue the applicant a licence if he or she believes it is necessary or desirable to protect the public. This means that the contravention in relation to the applicant must be of sufficient concern that the applicant should not hold a licence, not that a licence can be refused based on minor infractions.

A decision to refuse a licence remains a reviewable decision.

**Clause 26      New section 26C**

This clause inserts new provisions for criminal liability of executive officers in relation to the offence under the section 26B that requires licensees to give the Registrar written notice of specific events and circumstances linked to the eligibility to hold a licence and to automatic suspension grounds. Failing to notify is an offence with a maximum penalty of 100 penalty units. The penalty for this offence is the same as for the section 26B offence.

Early notification of these events and circumstances is important so that licence status can be updated, there is reduced risk of people continuing to operate under a suspension, and the Registrar can consider or instigate appropriate action if a licensee is no longer eligible to hold a licence.

However, as an executive officer may not be aware of the circumstances, the offence is taken to have been committed under this section if, the officer was reckless about whether the offence would be committed, was in a position to influence the conduct of the corporation in relation to the commission of the offence, and failed to take reasonable steps to prevent the commission of the offence.

Subsection (2) also provides for a range of things that must be considered when deciding if an executive officer took, or failed to take, reasonable steps. The court is not limited by these provisions in what it may consider.

The offence in this section does not apply if the corporation has a defence to a prosecution for an offence against section 26B. However, if the corporation does not have a defence, this section applies whether or not the corporation is prosecuted for, or convicted of, and offence against section 26B.

The offence applies to failures of the corporation to notify of relevant circumstances that occur after commencement of the provisions. Further information in relation to the presumption against retrospectivity is in the section *Application and retrospectivity* in this statement.

The offence is discussed in more detail in the *Offences and penalties* section of this statement.

**Clause 27      Nominees of corporations and partnerships**  
**New section 28 (2) (d)**

**Clause 28      New section 28 (3) (f)**

A nominee shares responsibility with the licensed corporation or partnership they are appointed by to supervise construction services and ensure they comply with the law. Licensed corporations and partnerships also have obligations in relation to their licences that are not the responsibility of the nominee to comply with, such as notification requirements.

These clauses (27 and 28) introduce an eligibility requirement for corporation and partnerships to be licensed to have written policies and procedures for effectively managing and supervising the nominee and the corporation's or partnership's licence, including arrangements for communicating regularly with nominees in relation to the construction services.

This means that a licence may be refused if a corporation or partnership cannot demonstrate it complies with these requirements.

**Clause 29      New section 28 (3A)**

Clause 29 provides that failing to comply with requirements for written policies and procedures for effective management and supervision of nominees and construction services

provided by the licensee is not a reasonable excuse to prevent actions being taken in relation to the licensee under this Act or an operational Act. This reflects the responsibility the licensee has to supervise their nominees and ensure services they provide comply with relevant laws.

**Clause 30     Part 4 heading**

This clause substitutes a new heading for Part 4 of *Rectification orders, enforceable undertakings and other obligations on licensee* that reflects the expanded scope of the part, which includes provisions for enforceable rectification undertakings in new Division 4.3 (see clause 42). At present the part is headed only *Rectification orders and other obligations on licensee*. It also includes a new Division 4.1 Preliminary.

**Clause 31     Section 33 heading**

Clause 31 replaces the current heading of *Meaning of authorised action and authorised licensee* in pt 4 with a heading of *Definitions—pt 4* as a consequence of including new definitions for the Part (see clause 32).

**Clause 32     Section 33, new definitions**

This clause includes two new definitions for Part 4 of *entity*, which refers readers to section 34 (1) (a) and *rectification undertaking*, which refers readers to new section 47B (see clause 42).

**Clause 33     New division 4.2 heading**

Clause 33 inserts a new division in Part 4 titled *Rectification orders and other obligations on licensees* to separate provisions for rectification orders from new provisions for rectification undertakings (see clause 42).

**Clause 34     Intention to make rectification order  
Section 34 (1), new example**

This clause inserts a new example of a plumber doing or supervising work as a nominee of a licensed corporation.

A rectification order can be made with respect to a licensee. All nominees are licensees and have obligations in relation to ensuring the construction services they supervise comply with relevant laws.

**Clause 35 Section 34 (2) (d) (i)**

This clause substitutes a new subsection that provides that the Registrar will not make a rectification order in relation to an entity if the Registrar accepts a rectification undertaking from the entity and the entity complies with, and does not withdraw, the undertaking. This is in addition to existing provisions that the Registrar will not make a rectification order if not satisfied it is appropriate to make the order in relation to the entity.

This amendment complements the new provisions for rectification undertakings in clause 42. If the entity complies with the undertaking, make a rectification order would no longer be appropriate. However, if the entity fails to comply with the undertaking, or withdraws the undertaking, it may be appropriate to make a rectification order (see clause 37).

**Clause 36 New section 34 (3)**

Clause 36 provides that a submission in relation to a notice of intention to issue rectification order may include a rectification undertaking (see clause 42) in relation to the construction service mentioned in the notice. This allows an entity to give an undertaking as part of the existing rectification order process, rather than requiring a separate or parallel submission in relation to the contravention.

**Clause 37 When rectification order may be made  
New section 35 (1) (d)**

This provision allows the Registrar to issue a rectification order if he or she accepts a rectification undertaking from an entity in response to a notice of intention, and the entity fails to comply with the undertaking, or has withdrawn the undertaking.

This is important as entering into an undertaking prevents the Registrar from making a rectification order or taking other action in relation to the contravention (see clauses 35 and 42, specifically new section 47I). The intent of the provision is that the Registrar need not restart the notice of intention process if an undertaking is not complied with and further delay rectification work the Registrar considers is required.

### **Clause 38 Section 35 (3) and examples and note**

This clause substitutes a new section 35 (3) that does three things:

- Allows the Registrar to make a rectification order in relation to a director or partner of a licensed entity, or the director of a corporation that is a partner in a licensed partnership.
- Provides certain circumstances that a rectification order can be made beyond the 10 year period in which orders can generally be made.
- Provides that the 10 years in which an order may generally be made (notwithstanding the above) is taken from the later of the day the act that caused the contravention happened or ended; or the day any certificate was issued by the registrar under any of the following provisions of the *Building Act 2004* in relation to the building the subject of the construction service:
  - section 69 (Certificates of occupancy);
  - section 71 (2) (Certificate for building work involving demolition);
  - section 72 (2) (Certificate for building work involving erection of structure);
  - section 73 (Certificates of occupancy and use for owner-builders).

The ability to issue an order to directors and partners is intended to bring a measure of accountability to these people in relation to construction services the corporations or partnerships they are involved in provide. A director or partner may seek a review of the decision to make an order in relation to them (see clause 57).

The other amendments are intended to provide for the fair and effective operation of the provisions for rectification orders. In relation to the date the certificate is issued, this is the date the certificate that relates to the construction service was issued, and not for any subsequent certificates for alterations or additions to the building as certified. Later certificates that are unrelated to a previous construction service do not extend the 10-year period for the previous work. Further information about the intended operation of these provisions is in the *Rectification orders – identification of breach within 10 years* section of this statement.

### **Clause 39 Section 36 heading**

This clause makes a technical and consequential amendment to the heading of section 36 as the considerations for deciding when rectification order is appropriate apply to a range of provisions, including new section 39A and 39B (see clause 41).

### **Clause 40 Rectification orders New section 38 (2A)**

Clause 40 includes a provision intended to clarify that a rectification order that requires stated action, need not state how a thing required to be done under the order is to be done. The

example refers to meeting a performance requirement rather than prescribing how work is to be undertaken or how a building may need to be redesigned or altered to meet that requirement. A rectification order must still be made so as to provide sufficient clarity about the outcome that needs to be achieved.

#### **Clause 41     New sections 39A and 39B**

Clause 41 introduces new provisions relating to rectification orders, under which a rectification order can be made in relation to directors of a corporation that winds up, enters into administration or deregisters before or after a rectification order is made in relation to the corporation. The sections apply to directors of corporations that were directors at or after the time the construction service that led to the contravention was provided.

New section 39A provides for notification of directors if an order is yet to be made. Making an order in relation to a director is a reviewable decision.

Nothing in this section extends the period in which a rectification order may be made.

#### **Clause 42     New division 4.3**

Clause 42 inserts a new scheme for enforceable rectification undertakings relating to a licensee's or former licensee's contravention or alleged contravention of the Act or an operational Act in providing a construction service.

The primary intention of the provisions is that any undertaking lead to required rectification. Therefore, it is a requirement that any rectification undertaking includes one or more undertakings that will result in the rectification of the work done in the course of the construction service. This means a rectification undertaking cannot include only compensation or other actions that do not result in the work being rectified.

While a rectification order is enforceable and being complied with, the Registrar will not make a rectification order in relation to an entity who gave the undertaking (clause 35). Further, new section 47I prevents a proceeding being brought, or occupational discipline be taken against a person for a contravention or alleged contravention if a rectification undertaking is in effect in relation to the contravention.

The provisions are similar to existing provisions for enforceable undertakings in a range of ACT Acts as noted in this statement.

New section 47J includes offences in relation to failing to comply with a Magistrates Court order in relation to a rectification undertaking, with maximum penalties of 2000 penalty units. An application for an order may be made only if the Registrar believes on reasonable



grounds the rectification undertaking is being contravened. The penalty is the same as for intentionally failing to comply with a rectification order.

**Clause 43      New section 53A**

This clause provides that the Registrar may cancel a licence following an automatic suspension, if the grounds for the suspension still exist three months after the Registrar became aware of them. Reasons for suspensions relate to eligibility to hold a licence or operate as a licensee, and public safety.

The Registrar does not need to apply to ACAT for a cancellation. However, the affected licensee may seek a review of the decision to cancel the licence (see clause 58).

**Clause 44      Skill assessment of licensees**  
**Section 55A (1) (a) (ii)**

Clause 44 makes a technical amendment to correct the reference to the heading of section 56.

**Clause 45      Occupational discipline**  
**Section 56 (1) (a)**

This clause includes provisions that allow the Registrar to make an application to the ACAT for occupational discipline in relation to directors of licensed corporations, partners of licensed partnerships and directors of corporations that are partners in a licensed partnership. At present an application may be made in relation to a licensee only.

Existing review and appeal rights are preserved.

**Clause 46      New section 56 (1A)**

Clause 46 provides that the Registrar may make an application in relation to the directors and partners mentioned in amended section 56 (1) (a) (clause 45), whether or not:

- the Registrar has made an application in relation to the licensee; and
- the corporation or partnership still exists when the application is made.

**Clause 47      Considerations before making occupational discipline orders**  
**Section 57 (1)**

This clause makes a consequential amendment to section 57 (1) to correspond to amendments in clause 45 that allow applications for occupational discipline to be made in relation to directors and partners associated with licensees, rather than licensees only.

**Clause 48**     **Section 57 (2)**

**Clause 49**     **Section 57 (2)**

**Clause 50**     **Section 57 (2) (e) and (g)**

Clauses 48, 49 and make consequential amendments to section 57 (2) in relation to the amendments in clause 46, and omit references to *a licensee, the licensee* and *the licensee's* and replace them with references to *a person, the person* and *the person's* respectively. This is because provisions in clause 46 allow applications for occupational discipline to be made in relation to directors and partners associated with licensees, rather than licensees only.

**Clause 51**     **New section 58AA**

This clause provides that if the ACAT is considering an application for occupational discipline in relation to a corporation or partnership licensee, the ACAT may make an occupational discipline order in relation to any of the following whether or not an application has been made in relation to them:

- If the licensee is a corporation—a director of the corporation
- If the licensee is a partnership—
  - a partner of the partnership; or
  - a director of a corporation that is a partner of the partnership.

However, consistent with existing section 58A (3) in relation to related licensees, to ensure procedural fairness the ACAT must not make an order in relation to a person mentioned above if the related licensee has been given—

- (a) notice of the application for an occupational discipline order in relation to a licensee, and
- (b) notice that the ACAT is considering making an order in relation to the person; and
- (c) the opportunity to make representations to the ACAT in relation to the proposed order.

**Clause 52**     **Register—public information**  
**New section 107A (6) (aa)**

This clause relates to clause 43 (new section 53A). It provides that the public register must include the details of any cancellation under division 5.1, including the date of the cancellation and the reason for the cancellation. The Registrar need not wait for the time in which an application for a review of the decision can be made, or the outcome of a review, to publish the information as the intent of the public register is to provide information to protect people who have engaged, or may engage, licensees. However, under existing 107 (2) (c) and

(d), the Registrar must update the public register by not later than the end of the next working day after the day when a licensee's cancellation is lifted, overturned or expires, or the Registrar receives a direction from ACAT or a court about recording or removing information from the register.

**Clause 53      New section 107A (8) and (9)**

COLA provides for a public register of information about licensees. The bill (clause 53) provides that the public register—

- (c) must also include details about any order by the ACAT or a court in relation to a rectification undertaking given by a licensee that has been licensed in the period beginning on the day 10 years before the registrar most recently updates the register, and accepted by the Registrar; and
- (d) may include any other details about the rectification undertaking if the registrar believes on reasonable grounds that it is necessary or desirable to protect the public.

Information about a rectification undertaking included on the public register must be removed from that register if—

- the undertaking has ended and the registrar no longer believes on reasonable grounds that its inclusion is necessary or desirable to protect the public; or
- the Registrar receives a direction from the ACAT or a court, on application by the licensee who gave, or a person affected by, the undertaking, to remove the information.

The Registrar's decision to include information about a rectification undertaking is a reviewable decision (clause 59). A review can be sought by a licensee who gave the rectification undertaking, or a person affected by the undertaking.

**Clause 54      Recording rectification orders  
Section 108 (2)**

Clause 54 makes a consequential amendment in relation to recording rectification orders in the rectification order register, as amendments in clause 38 provide that rectification orders may be made in relation to people who are a director or partner of a licensed corporation or partnership, who may not hold a licence personally.

**Clause 55      New section 111A**

Clause 55 relates to clause 42 and the new scheme for rectification undertakings in that clause. The Registrar is required to keep a register of rectification undertakings in accordance with this section. The register is not public, but certain information from the register may be made public under new section 107A (8) and (9) (clause 53). Information about rectification undertakings remains in the register even if withdrawn or ended.

#### **Clause 56      New section 126B**

This clause inserts a new section that attaches liability to directors of a corporation in relation to certain overdue amounts owed by the corporation in relation to convictions of an offences against the COLA or an operational Act, an occupational discipline order, or a debt to the Territory. A liability applies regardless of the status of the corporation. The Territory may pursue the payment of the amount from the relevant directors.

Any amounts for which a director is liable under this section are the amounts the corporation owes. This means for amounts mentioned in subsections (1), (3) and (5) calculated at a corporate rate, the director is liable for the amount at the corporate rate, and not the individual rate.

There is more detailed discussion of these provisions in the *Human Rights Implications* section of this statement.

### **Part 6              Construction Occupations (Licensing) Regulation 2004**

#### **Clause 57      Reviewable decisions Schedule 4, item 13**

This clause makes a consequential amendment to the existing reviewable decision to make a rectification order under section 38 of the Act. It provides for people and entities to seek a review to correspond with new powers to make a rectification order in relation to directors, partners, and directors of corporations who are partners in licensed partnership in clause 38 of this bill.

#### **Clause 58      Schedule 4, new item 15A**

Clause 58 inserts a new reviewable decision of the registrar cancelling a licence following a 3-month period of automatic suspension under new section 53A (2) inserted by clause 43 of this bill. The licence can be cancelled under this section in relation to automatic suspensions under Division 5.1 only. In accordance with procedural fairness, the licensee whose licence is cancelled may seek a review of the decision.

**Clause 59      Schedule 4, new item 22A**

This clause inserts a new reviewable decision of including information about a rectification undertaking on the public register under section 107A (8) (b) inserted by clause 53 of this bill. The information that may be included in the register about the rectification undertaking is at the discretion of the registrar, but must be information the registrar believes on reasonable grounds is necessary or desirable to protect the public. For fairness, this provision allows a licensee who gave a rectification undertaking, or a person affected by an undertaking, to seek a review.