

## CLAUSE NOTES

### Building Amendment Bill 2012

**Clause 1: (Short title)**

Sets out the name of the proposed Act.

**Clause 2: (Commencement)**

Provides for the provisions of the Act to commence on a day or days to be proclaimed.

**Clause 3: (Effect of certain consequential amendments)**

A procedural clause to allow amended regulations to be changed in the future.

**Clause 4: (Principal Act)**

Self-explanatory. This amendment will form part of the *Building Act 2000*.

**Clause 5: (Interpretation)**

**(a) “accredited building practitioner”**

The definition is amended to provide that a person who was formerly accredited as a building practitioner under the *Building Act 2000* is defined as an accredited building practitioner for matters relating to complaints, investigations and appeals. The amendment allows for complaints to be made about the conduct of formerly Accredited Building Practitioners. The Act as it currently stands only allows for investigations of “accredited building practitioners” which by definition discounts those who are no longer accredited and denies the Director the ability to perform an investigation. In the past, on receiving a complaint, it has been found that some practitioners are not currently “accredited building practitioners” because they have not paid an annual accreditation fee or do not have current insurance.

**“accreditation scheme”**

This definition is added to improve clarity

**(b) “Appeal Tribunal”** The references to the Appeal Board are changed to Appeal Tribunal to effect the change

of jurisdiction. The Resource Management and Planning Appeal Tribunal ('RMPAT') will assume the statutory functions presently conducted by the Building Appeal Board ('BAB'). The BAB performs appeal, review and determination functions under the *Building Act 2000* and its regulations, and it also hears appeals under certain other Acts.

(c) **“authorised person”**

This amendment clarifies that it must be the building surveyor, permit authority or general manager relevant to the particular matter. .

The definition of **“builder”** is clarified. It includes a construction manager and demolisher. These classes of builder have always been included under the accreditation scheme.

(d) & (e) **“building action”**

The purpose is to correct a drafting error and replace the word 'and' with 'or'. This amendment makes it clear that the cause of a building action (litigation) may arise from defective building work or from defective plumbing work.

(f) **“Building Code of Australia”**

The Building Code of Australia is now published by the Australian Building Codes Board as Volumes One and Volume Two of the National Construction Code series.

(g) The definition of **“building order”** has been expanded to apply to new section 40(3)(da).

(h) The term 'assistant building surveyor' has been substituted by **‘building surveyor limited’** in the definition of building practitioner.

(i) **“building surveyor”**

This clause inserts a definition that clarifies that this is a person who is engaged by an owner to perform the statutory duties of building surveyor.

The category of ‘assistant building surveyor’ has been re-named **‘building surveyor limited’** for clarity and consistency with terms used by the professional institute the Australian Institute of Building Surveyors.

(j) **“building work”**

The purpose is to correct a drafting error and replace the word ‘and’ with ‘or’. It clarifies that the types of work listed are singular descriptions.

(k) **“Class 1– 9 building”**

The Building Code of Australia uses a numerical system to classify buildings and structures. There are 10 major classes, and some sub-classes. Class 1 – 9 includes all buildings within those nine classes and their sub-classes, and it covers all types of habitable buildings.

**“Class 7b farm building”** means a building used for the storage of goods or equipment associated with farming or horticultural activities. As a type of large shed, they are a type of building that is intended to be exempted from owner builder registration.

(l) **“National Construction Code Series”** means the series of codes published by the Australian Building Codes Board and it includes the Building Code of Australia and the Plumbing Code of Australia.

(m) **“owner”**

A revised definition is to be inserted that is consistent with the definitions used in other recent statutes. It is inclusive of people who have contracted to buy land or have a long lease, or have a life tenancy.

**“owner builder”**

The definition of “owner builder” is to be revised to only refer to a natural person registered under the new s.30D for work on any Class 1 – 9 buildings or an owner who carries out work on a Class 10 building.

(n) The definition of “**plumber**” is updated to refer to the Occupational Licensing Act.

“**Plumbing Code of Australia**” means the Code published as volume three of the National Construction Code series.

(o) “**unique plumbing product**”

A definition of a unique plumbing or drainage product for the purposes of s.77 (Special plumbing permit) is inserted. This allows for innovation in the installation of one-off prototypes of plumbing products.

(p) “**unsatisfactory professional conduct**”

The clause amends the types of conduct that may amount to unsatisfactory professional conduct of an Accredited Building Practitioner. It adds failure to comply with the provisions of the Building Practitioner Accreditation Scheme.

(q) “**wet well**” defines an additional type of plumbing installation for which a special plumbing permit is required.

(r) New sub-clause (3) refers to the use of the term ‘class of a building’ being consistent with the Building Code of Australia

**Clause 6: (Authorised Person may exercise powers in respect of building work on land accreted from the sea)**

Clarifies that an authorised person (including the general manager, a building surveyor and the permit authority) has powers to control building work on land, buildings or structures built over water, for example those that are situated below low water mark. The amendment is similar

to the existing powers that councils have for controlling developments below low water mark provided by the *Land Use Planning Approvals Act 1993*.

**Clause 7: (General functions of Director)**

In section 7(h) the word ‘review’ is replaced with ‘audit’ for clarification and consistency with other parts of the Act. Currently the Director’s functions include audits of accredited building practitioners, owner builders and councils. The other parties may have their performance ‘reviewed’. The amendment provides that the Director may audit the performance of any parties involved in the building process – owners, owner builders, plumbers, building practitioners, general managers of councils and permit authorities.

**Clause 8: (Section 7A inserted, Powers of Director)**

The new section 7A provides powers to the Director to act in relation to the functions of the Director. The Act previously did not provide any specific powers to the Director to carry out his or her functions.

**Clause 9: (Duties of builders and plumbers)**

The word “building” is unnecessary and should be deleted from clause (3) (c). Plumbers do not usually perform building work.

**Clause 10: (Sections 23, 24 and 25 substituted)**

Revised definitions and provisions relating to accreditation of building practitioners, owner builders, and the corporate bodies or partnerships associated with accredited building practitioners are included as a result of six years’ experience with the Act. Specific provisions are included to prevent the misuse of accreditation.

**23 – (Interpretation)**

Clause includes new definitions of the accreditation card, certificate of accreditation and accreditation number issued to accredited building practitioners, and the purposes for which those documents may be used in relation to the building practitioner’s business activities.

### **23A Persons must be accredited for certain work**

This clause provides that any person performing the work of an accredited building practitioner must be accredited, and specifies those who are exempt from accreditation. The threshold amount (\$5000) and the requirement that the work require a building permit are the same as the current Act. Only natural persons may be accredited as in the current Act

An improvement over the current s.23 is that it makes a clear prohibition on persons entering a contract for building work unless accredited. There is also a clear link from this section (which allows body corporates and partnerships to do building work) to section 25 which sets the compliance requirements for those body corporates and partnerships.

There are exemptions from accreditation for other employees of compliant body corporates and partnerships and for persons performing specific types of building work, including plumbers, electricians and owner builders. This is similar to the existing exemptions for these persons in section 23(3) of the Act.

The revised section 23 removes the current exemption allowing an owner builder to be an 'owner designer' and to design their own building work. Design to the standard to enable certification of likely compliance with the building code is a technical skill few owner builders possess, and this existing exemption has opened the door to some non-accredited designers to cater for the owner builder market. Removal of the exemption for owner designers is supported by the Australian Institute of Building Surveyors.

### **23B Persons must not purport to be accredited**

A person who is not accredited must not hold themselves out as being able to do the work of an accredited building practitioner.

### **23C Persons must be accredited to do the work of a building surveyor**

Any statutory functions of a building surveyor (certification or inspections) must be performed by an accredited building surveyor or building surveyor limited – there is no monetary threshold for this type of work. Previously it may have been possible for an unaccredited building surveyor to perform statutory functions for building work under \$5000.

**23D Practitioners must not purport to be accredited in a particular category or class**

Example: an accredited builder low- rise cannot claim to be able to do the work of a builder at a higher level.

**23E Accredited practitioners must not use another practitioner's accreditation**

Example: an accredited builder uses the name and accreditation number of an accredited architect on a building permit application as the designer of work, without that architect having any involvement or knowledge of that work or the application. This would be an offence.

**23F Practitioners must not lend or allow use of their accreditation**

Example: as a favour to a friend, an accredited builder lends his name and accreditation number to a non-accredited person to write on an application for a building permit; later he turns of blind eye to the continued use of his accreditation details by that non-accredited person. This would be an offence.

**23G Non-accredited persons not to use practitioner accreditation**

Example: An owner writes down the name of an accredited builder on documents so that the owner can obtain a building permit and not have to register as an owner builder. This would be an offence. Subclause (2) allows for use for ordinary business activities.

**24 Professional Misconduct**

The new s.24 provides that an accredited building practitioner who contravenes this Part is guilty of professional misconduct.

It replaces the existing s.24 (Owner Builder) as all owner builder provisions are to be consolidated in new sections 30A - 30G.

## **25 Bodies corporate and partnerships**

The addition of a reference to “the Crown” is made to remove any doubts that a person who is an employee of the Crown may apply for and be accredited as building practitioner to perform building work on behalf of their employer. This is required because the definition of “person” in the *Acts Interpretation Act 1931* does not include the Crown.

The clause clarifies that a body corporate or partnership operating as a building practitioner is responsible for the carrying out or the management of building work.

Sub-sections (2) and (3) allow councils to engage a building surveyor through a contract for services rather than having to employ them as a permanent employee if the council offers building surveying services. Many smaller councils do not have a building surveyor on their permanent staff, but offer building surveying services or have on-going obligations to follow up building permits issued prior to the commencement of the *Building Act 2000*.

## **Clause 11 (Application for accreditation)**

An applicant for accreditation or re-accreditation must satisfy personal probity requirements before they can be accredited by the Director. These requirements will be prescribed by regulation. There are already personal probity requirements published for the *Occupational Licensing Act 2005* applicable to plumbers and electricians, and a similar requirement will apply under the proposed National Occupational Licensing System for tradespersons.

The Director of Building Control may take into account an applicant’s previous suspension or cancellation of their licence as a building practitioner, by a regulator in another jurisdiction.

An accredited building practitioner who has had their accreditation cancelled or suspended (due to a disciplinary action by the Director) cannot reinstate their accreditation



automatically by simply paying their fee on the renewal date.

**Clause 12 (Certificate of accreditation)**

A certificate of accreditation may be cancelled if it was obtained by fraud or as the result of a false declaration.

**Clause 13 (Period of accreditation certificate)**

- (a) The period of the practitioner accreditation certificate is to be set at one year (instead of 3 years) and then renewed annually. Annual fees will remain the same. Nearly every other state or territory already licences builders annually.
- (b) An accredited building practitioner will have 28 days to pay the annual fee after the due date, not 60 days as is now provided. This is in line with normal business practices.

**Clause 14 (Renewal of certificates)**

For the consideration of a renewal of accreditation, the Director is to take into account a practitioner's previous suspension of their accreditation. Applicants for re-accreditation must also comply with the prescribed personal probity requirements.

**Clause 15 (Part 4, Division 3 substituted)**

**Owner builder registration**

These amendments consolidate all owner builder provisions in a replacement Division 3.

This Division replaces (and in the most part replicates) the registration system now contained in the *Building Regulations 2004* (introduced in 2007 as a temporary measure) with a registration system in the Act.

**30 (Interpretation of this Division)**

The definition of building in this Division clarifies that all buildings, which under the BCA constitute a single classification, are treated as a single building. This reflects the previous provisions in the definition of owner builder.

**30A (Requirement to be registered)** provides the types of owner builder work and the monetary threshold which requires persons to be registered owner builders.

Owner builders need to be registered for work on a Class I-9 building that needs a building permit and has an estimated cost over \$5,000.

Only natural persons can apply to be registered. Corporations cannot be registered as owner builders. This is to ensure that an individual takes responsibility for the building and that non-accredited builders do not abuse the system by using multiple companies. They would be in the business of building but the company may not be. Corporate bodies with special circumstances (such as community associations) may apply to the Director to be owner builders under new s.30F which reflects the previous s.24.

Where land is jointly owned, all owner builders must be registered as is the current practice.

Accredited builders have no need to be an owner builder – they already have a licence to build as many buildings as they wish.

A new provision is that owner builders of larger farm storage sheds (Class 7b farm buildings) are exempt from registration.

Small sheds or non-habitable structures (Class 10 buildings) are also exempt from registration (the same as current requirements).

**30B (Eligibility)** This defines the interests of persons who are not eligible to be an owner builder. For fairness there are some new extensions to the eligibility criteria e.g. the inclusion of persons with a long lease and life tenants through the new definition of ‘owner’ in s.3.

There are no changes to the current number of buildings (two) or the types of building work that an owner builder can work on in a ten year period. A register is kept by the Director of owner builders to ensure they do not exceed 2 buildings in 10 years.

Any owner builder work before the Act commenced in 2004 is not counted.

A prospective owner builder will to be required to complete an owner builder awareness course before being registered. Currently prospective owner builders simply sign a statement that they have read the Owner Builder Guidelines and are aware of their obligations. However there is no means to verify whether they are genuinely aware of risks and responsibilities of building. Evidence suggests this requirement has been abused.

The awareness course will comprise reading information about being an owner builder, and answering multiple choice questions. This would essentially cover the material currently published by the Director in the Owner Builder Kit. The Director will stipulate the specific course material. Course providers would be authorised by the Director. A course could be completed in about 5 hours.

**30C (Application for registration)** The applicant engages a building surveyor who applies for registration on their behalf. This process has operated successfully since 2007 and speeds up the registration process as the building surveyor is in a position to assist clients with advice and completion of the application form.

**30D (Granting of registration)** Successful applicants will receive an owner builder certificate with a registration number that entitles them to build or alter a particular building. They can then apply for council building permit.

**30E (Subsequent building work on same building)** An owner builder who has been registered to construct, alter or renovate a particular building, does not have to apply again for registration for any additional work on that same building.

**30F (Special Circumstances)** A person not eligible for registration can claim there are special circumstances. For example if they had already built their two buildings and their owner builder constructed home was destroyed by fire. Very similar to the current s.24(2).

## **Clause 16 (Complaints)**

Provides for the clarification and enhancement of the process where the Director receives a complaint made

against an accredited building practitioner. The Crown (including the Director of Building Control) may make a complaint about the professional conduct of an accredited building Practitioner. Conduct is measured against a Code of Conduct published by the Director.

There is a time limit as to when a complaint may be received by the Director (6 years after the commencement of the work complained about).

A complaint is to be written, contain particulars of the conduct complained about, and be made as a statutory declaration. (Existing provisions)

The Director may decide not to proceed with the investigation of a complaint if it is found, after a preliminary enquiry, there is no case to answer by the accredited building practitioner.

The new subsection (5) clarifies the circumstances when a valid complaint has been received by the Director and enables an investigation of that complaint to commence.

Subsection (6) provides that the Director may initiate a formal complaint against an accredited building practitioner if during a prior investigation or audit, evidence is found that a practitioner is, or may be, guilty of unsatisfactory professional conduct or professional misconduct.

#### **Clause 17 (Notification to building practitioner)**

An accredited building practitioner the subject of a complaint has the right to view all relevant documents about a complaint held by the Director as if they had made a formal request for that information.

#### **Clause 18 (Investigations)**

A Clarification. During an investigation of a complaint made against an accredited building practitioner, the Director may find evidence of misconduct by other practitioners. The Director may then investigate that misconduct as if a formal complaint had been made about the other building practitioner.

## **Clause 19 (Production of documents)**

The changes enable relevant documents for investigation of a complaint to be requested from any relevant person. Currently the Director can only request documents from the individual building practitioner under investigation but not from their employer or a business partner.

## **Clause 20 Section 37 substituted**

### **Powers of entry and inspection**

This Clause establishes the powers of the Director or an approved investigator to inspect work and enter buildings. Currently entry to a site is only with the consent of the person in control; however this could be the same person who is being investigated. Entry to classes of “residential” buildings may still only be made with the occupant’s consent or a search warrant. Residential buildings include houses, flats, units, hotel/motel rooms and caretakers’ flats.

The powers of the Director have been made consistent with those provided for an authorised person in s.258 (See also clause 98 which amends the entry powers of an authorised person.)

## **Clause 21 Section 39 substituted**

### **Misconduct and offences during investigations**

An accredited building practitioner is guilty of professional misconduct for certain conduct during an investigation.

The words of current s.39 (a) and (b) are renumbered as subsection (1). Subsection (2) creates new offences. Words used in the new subsection (2) are the same as the existing s.241 of the Act, which applies where an authorised person is exercising their powers.

## **Clause 22 (Decision of Director)**

(a) This clause enables the Director to use the existing enforcement provisions of the Act. It provides that the Director (as if exercising the powers of a general manager or a building surveyor issuing a building order) may order an accredited building practitioner found guilty of unprofessional conduct or professional misconduct, to carry out building work so that the work complies with the

building permit. An order may be subject to any reasonable or relevant conditions.

(b) The penalty units for the fine that the Director may impose on the practitioner have been increased to be consistent with the penalties for similar offences in the Act.

(c) The building practitioner is guilty of professional misconduct for a failure to comply with an order by the Director. An order remains in force until complied with or revoked.

(d) The Director may publish any details about the suspension or cancellation of the accreditation of an accredited building practitioner if it is considered to be in the public interest.

**Clause 23 (Notice of Decision by Director)**

A reference is inserted to the new order by the Director to a guilty practitioner to carry out particular work.

**Clause 24 Heading Amended**

Part 4 of Division 6 now deals with the review of several of the Director's decisions by the Appeal Tribunal.

**Clause 25 Sections 42 and 43 substituted**

**Applications for review**

The re-structured section 42 provides that an accredited building practitioner may seek to have a decision or action of the Director in relation to an application for accreditation, or a decision in relation to a complaint, reviewed by the Appeal Tribunal.

A complainant may ask for a review if the Director has determined that the Practitioner has no case to answer. It also now includes an ability for an applicant for owner builder registration to seek a review.

The new section 43 provides for the powers that the Appeal Tribunal may exercise upon a review and allows the Tribunal to rely upon existing reports rather than have to carry out full new investigations. The requirement in the

past for the Appeal Board to always re-investigate matters has proven inefficient and costly.

**Clause 26 (Decision of Appeal Tribunal)**

The amended section 44 provides for the decisions that the Appeal Tribunal may make in relation to owner builders and requires that the Director must give effect to a decision of the Appeal Tribunal.

**Clause 27 (Notice of decision of Appeal Tribunal)**

Section 45 is amended to reflect the changes made to Section 42 to direct the notices of decision to the appropriate person.

**Clause 28 (Appeal to Court)**

Section 46 is amended to reflect the change Appeal Tribunal.

**Clause 29 (Powers of Court on review)**

The penalty units that the Magistrates Court may impose have been increased, to be consistent with the fine that can be imposed by the Director on an accredited building practitioner in section 40.

**Clause 30 (Order requiring insurance)**

This is a consequential amendment to remove a redundant provision. The *Housing Indemnity Act 1992* was amended in 2008 to remove the requirement that owner builders buy Housing Indemnity insurance to cover their building work. The amendment will allow the specification of other types of insurance such as public liability and worker's compensation insurance.

**Clause 31 (Offences relating to insurance)**

The requirement for insurance before an owner builder sells is redundant as Housing Indemnity insurance for owner builders is no longer required by the *Housing Indemnity Act 1992*.

## **Clause 32 Part 4A inserted**

### **Audits and investigations**

**50A Audit by Director** The Director may arrange for performance audits of the work of any person or body referred to in s.7(h). Clause 7, General functions of Director, outlines all the Director's functions including an audit function. Subclause (3) enables the Director to investigate conduct issues arising from an audit.

### **50B (Powers of Director) & 50C (Director may require records..)**

When performing an audit of a person, the Director may exercise specific powers including making request for documents. The clauses provide a penalty for non-compliance by an accredited building practitioner or another person. The proposed amendments are similar to the powers of the Director of Consumer Affairs under the Travel Agents Act and provide formal processes and requirements which have been found to be needed

## **Clause 33 Section 5I substituted**

### **(Exercise of powers by building surveyor)**

Subclause (1) introduces a penalty if a building surveyor does not perform their statutory function. This will clarify that building surveyor's obligations are foremost to the community as statutory officers. Previously this penalty only applied to assistant building surveyors. It is a drafting correction.

Subclause (2) is an update of terminology from "assistant building surveyor" to a "building surveyor limited". There is no change proposed for the scope of work of building surveyor limited.

## **Clause 34 (Exercise of powers prohibited)**

Provides that an accredited building surveyor must not exercise their statutory powers where there is a conflict of interest between their personal or business interests and the interests of their client or the public.



## **Clause 35 Section 52A inserted**

### **Engagement of building surveyor**

The new clause provides that an owner must engage a building surveyor in writing. If the engagement is arranged by the owner's agent, the onus is on the building surveyor to confirm that contract with the owner in writing within 7 days. Previously the legislation intended that the owner engage the building surveyor but in practice owners frequently did not know who the building surveyor was or understand the building surveyor's role.

## **Clause 36 Section 53A inserted**

### **Building surveyor may resign from engagement**

A building surveyor may resign from their engagement, with the consent of the Director, if it is within three years of the engagement. After three years they may resign at any time with no consent required.

Upon resignation, the building surveyor is to ensure that relevant documents relating to the building project are provided to the permit authority. This will ensure that a new building surveyor will have access to documents to enable completion of the work.

These clauses ensure that building surveyors do not resign from engagements without due reason and provide relief for private building surveyors from ongoing commitments when an owner fails to complete the building work within 3 years. Private building surveyors are not enduring corporations like councils were when they exclusively performed this task.

## **Clause 37 (Compliance with Building Code)**

If the Appeal Tribunal has made a determination (in relation to a specific building project), that a provision of the Building Code of Australia or the Building Regulations can be varied, then the building surveyor is to take that determination into account when assessing that proposed building work. An example of a determination would be a decision in relation to "unjustifiable hardship" under the new section 218A.

## **Clause 38 Section 58 substituted**

### **Tasmanian Plumbing Code**

Subsection (1) is the same as the current section 58.

A new subsection (2) provides that the Tasmanian Plumbing Code may adopt parts of the Plumbing Code of Australia as the technical standards for plumbing work in Tasmania.

## **Clause 39 (Building permit required)**

Currently a building surveyor may decide that proposed building work would be a minor alteration or a minor repair and therefore it does not need a building permit. It appears that some owners who have performed illegal building work by not obtaining a permit, have used this provision retrospectively to escape any enforcement action.

There have also been examples drawn to the attention of the Director of the abuse of this provision, to allow large amounts of complex work or new erections to take place that should have required a building permit.

It is also apparent that the existing provisions have been abused to enable building work to be carried out by non-accredited building practitioners.

The type of work permitted without a permit is the repair or alteration of an existing building and it does not allow for “minor new erections” such as a new deck or a new room

This amendment provides:

- The scope of work which can be considered a minor alteration or repair, is now limited to \$5,000. This is the same threshold for work that requires the work to be performed either by an accredited building practitioner or a registered owner builder. This is designed to prevent circumvention of the accreditation provisions of the Act by non-accredited persons.
- Improved procedures for the notification of the permit authority of the proposed works and for inspections by the building surveyor.

- It should be noted that the *Building Regulations 2004* already provide exemptions from a building permit for specific types of small building projects.

**Clause 40 (Certificate of likely compliance required)**

The changes clarify that a building surveyor is to be engaged by the owner or agent to grant a certificate of likely compliance.

The new subsection (2) provides that the Director of Building Control may specify the documents that a building surveyor is to receive with an application for a certificate of likely compliance.

**Clause 41 (Consideration of application for certificate of likely compliance)**

Relevant matters that are to be considered by a building surveyor in the granting a certificate of likely compliance will include:

- the requirements of this Act and the Building Code of Australia;
- any determination made by the Appeal Tribunal, and
- a certificate provided by the responsible designer.

**Clause 42 Section 67A inserted**

**Certificate of likely compliance not to be dated more than 12 months before application for building permit**

A certificate of likely compliance that is more than 12 months old must not be submitted with a new building permit application. As the Building Code of Australia is amended annually, a certificate older than 12 months would refer to an assessment against provisions of a previous edition of the Code and therefore may not reflect current building standards.

**Clause 43 Section 71 substituted**

**Consideration of application for building permit**

Subsection (1) is the same as the current provision. The insertion of the new sub-section (2) clarifies that when assessing an application for a building permit, the permit

authority may rely on other permits (such as a planning permit) as having been validly granted. This amendment is intended to overcome doubts created by a recent Supreme Court decision that suggested that the permit authority has to place itself in the position of an original decision maker to see whether any permit or consent granted under other Acts was validly made.

**Clause 44 (Special plumbing permit)**

Additional types of plumbing systems or devices that require an applicant to obtain a special plumbing permit are included. These types of plumbing systems or devices pose a greater risk to health and the environment and it is appropriate that more stringent assessment of the proposed work applies. The permit authority may also impose additional operational and maintenance requirements for these systems or devices under a special plumbing permit.

**Clause 45 (Consideration of application for plumbing permit)**

The permit authority is to consider any determination made by the Appeal Tribunal as a relevant matter that is to be considered in the granting of a plumbing permit.

**Clause 46 (Carrying out building work)**

Clarifies the existing provision regarding variations of the building work during construction, where there are changes from what was permitted in the building permit. The existing provisions have proven to be insufficient.

The consent to these changes, by the building surveyor or the permit authority, is to be recorded in writing.

These variations are to be documented by amendment of relevant plans and specifications.

**Clause 47 (Starting building or plumbing work)**

(a) Provides that the accredited builder, or the registered owner builder, is to give a notification and then receive the authorisation of the building surveyor, before any building work starts. The notification is to identify who will be the responsible builder for the work. The

existing provisions have not provided sufficient certainty because builders failed to submit start work notices.

Authorisation is already a requirement before commencing plumbing work.

(b) and (c) Penalty units have been increased for the offences.

(d) Repeals a requirement that a building surveyor provide a copy of a start work notice from an owner builder to the Director. The new owner builder registration system in this Bill removes the need for this requirement.

Subsection (4) specifies who must seek authorisation to start work from the building surveyor.

The building surveyor is also to be satisfied that the carrying out of the work is likely to comply with the *Building Regulations 2004*. That would include matters such as protection for the public and of adjoining properties.

A copy of each start work notice received by the building surveyor from the builder is to be provided to the permit authority. This was requested by councils so that they are aware of the commencement of building in their area.

#### **Clause 48 (Inspections)**

The new subsection 3A provides that the plumbing permit authority must inspect, or cause to be inspected, plumbing work on a greywater or recycled water system. Such systems pose a greater risk to health and the environment and all such installations should be subject to an inspection.

#### **Clause 49 (Certificate of final inspection)**

The building surveyor is to certify that the building work, as far as it is practicable to inspect, complies with the Act. This clarifies that the visible work must actually comply with the Act and hence the Building Code of Australia and any applicable Australian Standards; any lesser standard is not acceptable. The reference to “so far as it is reasonably practicable to inspect” recognises that a building surveyor cannot inspect hidden work.

The existing clause can be misinterpreted to allow a degree of non- compliance.

#### **Clause 50 (Granting occupancy permit)**

A new requirement that before a building surveyor may issue an occupancy permit, he or she must be satisfied that the mandatory requirement for operational smoke alarms is met and that a water supply and satisfactory sanitation facilities are available for the occupants. Whilst the determination of suitability for occupancy is one for the building surveyor to make depending on the particular circumstances it has become necessary to specify these three pre-requisites.

#### **Clause 51 (Refusing application for occupancy permit)**

(a) Drafting clarification; the 'and' in s.99(1)(a) should be 'or'.

(b) Grounds for the refusal of an occupancy permit are to include inadequate provision for a water supply, sanitation or smoke alarms.

#### **Clause 52 Section 102 substituted**

##### **Notification to permit authority**

New subsection (2) inserted. This amendment provides that where a Reporting Authority has previously provided a report on proposed building work, the building surveyor must provide the Reporting Authority with a copy of an occupancy permit. A reporting authority includes the Tasmania Fire Service and a council's environmental health officer. The Reporting Authority may then decide to exercise its right of appeal against a decision of the building surveyor not to adopt anything in the report it provided.

#### **Clause 53 (Completion of building work)**

(a) The Permit Authority (building) is to take into account a certificate of completion of the plumbing work as a document relevant to consideration of granting of a certificate of completion of the building work.

(b) The Act currently provides that building work is to be completed within two years of the date a building permit was granted. However the building permit currently does not lapse.

The amendment provides revised procedures for the permit authority to ensure building work is completed within the two years or as soon as possible thereafter.

After two years a building permit (and a permit to proceed for illegal building work) will expire if work is still incomplete. An owner may apply for an extension of the permit before it expires. The permit authority may extend a building permit after receiving advice on the status of the work from the building surveyor.

The Permit Authority may impose reasonable conditions on the extension of a permit.

For illegal building works that are substantially complete, an owner has 12 months to finish all work under a permit of substantial compliance.

#### **Clause 54 (Completion of plumbing work)**

(a) and (b) Clarification that all plumbing work must comply with any relevant provisions of the Act (which includes the Plumbing Regulations).

(c) A plumbing permit authority currently may accept certificates of compliance from plumbers for all work for which it has issued plumbing permits. It was not the intent of the Building Act to allow unlimited “self-certification” of work by plumbers. It was expected that permit authorities would still arrange for the inspection of plumbing work for which they have granted permits. The current provisions to accept a certificate from the plumber was to be the exception. However some permit authorities have been accepting those certificates for all plumbing work in their municipality and not undertaking any inspections.

This amendment therefore provides that the permit authority must carry out, or cause to be carried out, inspections of at least 20% of the work in every year for which it would otherwise have accepted certificates of compliance from plumbers. Inspections shall be at the mandatory notification stages during construction of that plumbing work. This is intended to function as a random audit of the standards of the plumbing work done by plumbers who would otherwise have provided certificates of compliance.

**Clause 55 (Defective plumbing work)**

The omission of a component of a plumbing product or system, or the omission of a procedure in the installation of a plumbing product or system, is defective plumbing work.

**Clause 56 Section 115A inserted**

**Change to existing building boundary**

A property boundary is regarded as a fire source feature and a building's required construction depends on the distance from the property boundary.

Alteration of a property boundary may bring the existing building into non-compliance because of inadequate fire safety or health provisions.

This clause re-instates a similar provision in previous building legislation.

If a boundary is altered, building work may be required to maintain compliance with the Act. This would require a building permit.

**Clause 57 (Maintenance of essential safety features or measures)**

(1)(a) Clarifies that an occupier of a building may be the person contractually responsible for carrying out the maintenance of the essential safety features or measures of a particular building. Previously this provision was in the regulations.

(b) and (c) Clarifies that only those specific safety features or measures that have been prescribed (listed by the Director) are required to be maintained.

(d) and (e) New sub-clause (c) allows for other types of features or measures of a building to be prescribed and required to be maintained by the owner or occupier. These features could include: Special features providing access to premises for persons with a disability, water efficiency, energy efficiency or the safety features or measures of buildings constructed in bushfire prone areas. Many of these requirements will be worthless if owners do not maintain them.

(f) Same as (a)



(g) Same as (b) and (c)

(h) Clarifies that the standard of performance of safety features or measures is the standard to which they were originally required to perform at the time of installation.

(i) Inserts an interpretation of 'owner' for the purposes of s.120 to clarify that, for land or buildings in a strata title scheme, the body corporate is a responsible owner and it has a responsibility to ensure the essential safety and health features and measures installed for the safety of all private lot owners as well as the common areas are maintained.

## **Clause 58 – Clause 62**

### **(Sections 127, 130, 136, 137, and 147 amended)**

The existing provisions in relation to the protection of adjoining properties are amended to change the reference from the (Building) “Appeal Board” to “Appeal Tribunal”.

## **Clause 63 (Interpretation – landslip areas)**

This clause only applies to land in a declared A landslip area or declared B landslip area. A declared A landslip area is the highest risk zone.

The general definition of a “building” in s.3 of the Act includes part of a building. For building work in a declared A landslip area, the term ‘building’ instead refers to the entire building on the site (either existing or proposed to be erected). A definition of an “insubstantial building” is also inserted. This is intended to prevent the perverse outcome of owners constructing or enlarging a building in increments of 25m<sup>2</sup> to create a substantial building that imposes excessive loads on unstable ground and thus becoming a risk to other landowners as well as themselves.

## **Clause 64 (Effect of order in A landslip area)**

Similar provisions to the Building Act restricting building in landslip areas have been included in building legislation since the 1970s. This amendment is consistent with the intent of those enactments. For owners of land in an A landslip area who want to undertake new erections, they may only erect a shed, or a insubstantial building that is no more than 25m<sup>2</sup> in floor area and no more than one storey high.

#### **Clause 65 (Building notices)**

A building notice questioning compliance with the Act may be served on the builder or the owner of the land. A copy of that notice is also to be provided to the other party, e.g. if a notice is served on the builder, the owner of the land receives a copy so that they are aware of a matter. A building notice is a “show cause” style notice.

#### **Clause 66 (Plumbing notice)**

Identical reasoning to clause 66 above. If a plumbing notice was served on the person carrying out the plumbing work, a copy is also to be issued to the owner.

#### **Clause 67 (Fire hazards)**

The changes are partly a restructure of the existing section to provide clarity and the addition of further factors which would constitute a fire hazard. A building or temporary structure may constitute a fire hazard if there are insufficient means to fight a fire or insufficient physical compartmentation or separation. The Tasmania Fire Service has recommended this amendment based on practical application since the introduction of the Act.

#### **Clause 68 (Building orders)**

(a) Clarifies that if a building notice was served on a person (the owner or the builder), then if a building order is later served, then it must be served on that same person.

(b) Clarifies that the building order is to relate to a particular building or temporary structure.

(c) Deletes the word “specified” as that word is defined in s.3 of the Act to mean as specified by the Director of Building Control, not by the general manager who requires the work to be carried out.

(d) & (e) Where a building surveyor has issued an inspection direction to the builder under section 91 regarding defective work, and that direction has not been complied with, the building surveyor (or the general manager if necessary) may then issue a building order requiring that the defective work to be rectified or other work performed.

(f) A building order relating to an earlier inspection direction may be served without issuing a building notice. The inspection direction in effect becomes the formal notice that a problem needs to be rectified.

(g) Provides the circumstances where a building order may be served without a prior building notice if, for example, the person could continue illegal work or will make compliance with a later order more difficult. Effectively this is a “stop work” order.

#### **Clause 69 (Plumbing orders)**

(a) Clarifies that the plumbing order is to be served on the same person who was served with the prior plumbing notice

(b) Clarifies that a plumbing order may be served without first issuing a plumbing notice, if the work required to be performed under the order is only of a minor nature. This amendment is consistent with the process for a building order in section 170(3) where the work to be performed is minor.

#### **Clause 70 Section 179 substituted**

##### **Consideration of application for permit to proceed**

This is identical to the amendment of section 71 (Clause 43)

The new sub-section (2) clarifies that when assessing an application for a permit to proceed, the permit authority may rely on other permits (such as a planning permit) as having been validly granted. This amendment is intended to overcome a recent Supreme Court decision that suggested that the permit authority has to place itself in the position of an original decision maker to see whether any permit or consent granted under other Acts was validly made.

#### **Clause 71 (Granting permit to proceed)**

When a permit authority issues a permit to proceed, it is to provide a copy of that permit, to the relevant building surveyor.

**Clause 72 (Consideration of application for permit of substantial compliance)**

This is identical to the amendments of sections 71 (Clause 43) and 179 (Clause 70).

Insertion of the new sub-section (2) clarifies that when assessing an application for a permit to of substantial compliance, the permit authority may rely on other permits (such as a planning permit) as having been validly granted. This amendment is intended to overcome a recent Supreme Court decision that suggested that the permit authority has to place itself in the position of an original decision maker to see whether any permit or consent granted under other Acts was validly made.

**Clause 73 (Granting permit of substantial compliance)**

When a permit authority issues a permit of substantial compliance, it is to provide a copy of that permit to the relevant building surveyor.

**Clause 74 (Demolition Order)**

Provides that a demolition order (issued to an owner for their non-compliance with an earlier building order) may not be issued if there has been an appeal lodged with the Appeal Tribunal regarding that earlier building order.

**Clause 75 (Failure to comply with building or plumbing order)**

(a) & (c) Deletes the word “owner” and substitutes “a person”. An order (building or plumbing) may have been issued against a person who is not the owner such as the builder, the plumber or a person in charge of a worksite.

(b) New subsection (1A) provides that if a person has not complied with a building order issued by the building surveyor, and that order has been referred to the general manager, then the general manager is to take reasonable steps to enforce that order.

(d) Provides that if a person has not complied with an emergency order, that work may be carried out by the council in a similar manner to when a person does not comply with a building order or a plumbing order.

**Clause 76 (Endorsements on certificates)**

This clarifies that an endorsement on a Certificate of Completion only relates to a building order under s.171 regarding work started without a building permit. The amendment excludes a reference to a building order issued for a minor matter.

**Clause 77 Section 197 substituted**

**Recovery of costs**

When building or plumbing orders are not complied with by the owner, a council may have to incur costs during enforcement actions. The new subsection (2) will enable the recovery of these costs by a council as if they were rates or charges on the owner's land.

**Clause 78 (Duration of order)**

Clarifies that an amendment of an order does not revoke that order.

**Clause 79 (Part 12, Division 1 repealed)**

This Division is repealed as a consequence of the transfer of the appeal functions of the Building Act to the Resource Management and Appeal Tribunal.

**Clause 80- 88**

**(Amendment of sections 209, 210, 211, 212, 213, 214, 215, 216, and 217)**

“Appeal Board” is changed to “Appeal Tribunal” as a consequence of the transfer of the appeal functions of the Building Act to the Resource Management and Appeal Tribunal.

**Clause 89 New heading inserted – Application of regulations**

Inserts a new heading of new Division 2A of Part 12.

**Clause 90 (Application of regulations)**

“Appeal Board” is changed to “Appeal Tribunal”. The new subsection (1A) provides that this section is not to be used for determinations of the disability access provisions contained in the Building Code of Australia. See Clause 91.

## **Clause 91 Section 218A inserted**

### **Application for modification of regulations relating to access for persons with disabilities**

218A provides for a person to make an application to the Appeal Tribunal for a determination that a disability access provision of the Building Code of Australia will not apply or is to be applied with variations or modifications.

Subsection (2) provides who may apply for a determination (building owners, lessee, or their agent).

Subsection (3) provides that the only ground for a modification is unjustifiable hardship. Unjustifiable hardship is a concept included in the *Disability Discrimination Act (Cwth.) 1992 (DDA)*.

Subsection (4) requires that the Appeal Tribunal seek submissions from the Director of Building Control (the regulator), relevant reporting authorities (the Anti-Discrimination Commissioner) and the building surveyor.

Subsection (5) clauses (a) – (o) provide the grounds and matters to consider for an application based on unjustifiable hardship. These are derived from the Australian Building Codes Board Protocol *A Model Process to Administer Access for People With a Disability* and endorsed by the Commonwealth. The same provisions are used in the new Victorian legislation and give clear guidance to the Appeal Tribunal. Adoption of the Protocol gives greater certainty to owners and developers under the DDA.

Subsection (6) provides that the Board may then consider and balance the detriment to an applicant, building manager or developer, versus the need to ensure equitable access to types of buildings including commercial, accommodation, workplaces and public places.

Subsection (7) requires the maximum possible compliance with the BCA.

Subsections (8) and (9) provide interpretations for this section.

## **Clause 92 Sections 219 – 223 substituted**

New Section 219 inserted to refer to the “Appeal Tribunal”. Other sections not required as a consequence of the transfer of the appeal functions of the Building Act to the Resource Management and Appeal Tribunal.

**Clause 93 (Sections 225 – 229 repealed)**

Sections not required as a consequence of the transfer of the appeal functions of the Building Act to the Resource Management and Appeal Tribunal.

**Clause 94 Section 239A inserted**

**Prosecution of offences**

Provides that prosecutions for offences in the *Building Act 2000* must be commenced no more than two years from when the alleged offence first came to the attention of the authorised person. Currently the Act has no specified time limit.

**Clause 95 (False and misleading statements)**

This change increases the penalty units for the offence of providing false or misleading information, to be consistent with new section 30C(2).

**Clause 96 (Immunity from liability)**

References to “Appeal Board” are changed to “Appeal Tribunal”.

Clarifies that the immunity conferred on a permit authority or a building surveyor who relies on a certificate is for a certificate issued under s.266 of the Act, issued by a specialist or other party with particular qualifications as specified by the Director of Building Control.

**Clause 97 (Accrual of cause of action)**

Drafting correction of terminology to be consistent with the terms defined in the Act. The term “Occupancy Permit” is used instead of certificate of occupancy.

#### **Clause 98 (Access and entry into premises)**

The existing subsection (1) of section 258 was deficient as it should include access by an authorised person to plumbing work or work on a temporary structure.

The current subsection (2) is intended to preserve privacy rights of householders. However the phrase “any premises used for residential purposes” is too broad and could cover any structure used as dwelling, even if that residential use was illegal. This needed clarification in accordance with the building classification system used in the Building Code of Australia.

- Class 1 buildings – a house or unit, or single storey row of units;
- Sole occupancy units in a Class 2 or 3 building – a flat, unit or apartment; a hotel or motel room or unit;
- Class 4 buildings – a caretaker’s flat.

#### **Clause 99 (Powers of authorised persons)**

An authorised person may require the production of documents relating to a building work or to plumbing work. An occupier, or a building manager may be in possession of documents relevant to an investigation and those documents may not be in the possession of the owner.

#### **Clause 100 (Evidentiary provisions)**

Section amended as a consequence of the transfer of the appeal functions of the Building Act to the Resource Management and Appeal Tribunal.

#### **Clause 101 (Authentication of documents)**

Section amended as a consequence of the transfer of the appeal functions of the Building Act to the Resource Management and Appeal Tribunal.

#### **Clause 102 Section 266 substituted**

##### **Reliance on certificate of specialist or other person**

The existing provision is clarified.



A permit authority, building surveyor or a general manager may rely upon a certificate issued by a specialist or another party regarding building or plumbing work. The qualifications of these specialists or other parties are prescribed by the Director. The accredited building practitioner responsible for the design or building work is not required to give this certificate.

The purpose of these certificates of specialists or others” is to provide specialist advice for, or peer review of, a design to ensure that it has been designed in accordance with the building or plumbing codes and standards. Certificates can also be given relating to completed buildings, building or plumbing work, completed plumbing installations and temporary structures.

#### **Clause 103 (Section 269 repealed)**

Section no longer required as a consequence of the transfer of the appeal functions of the Building Act to the Resource Management and Appeal Tribunal.

#### **Clause 104 (Building permit levy)**

(a) – (d) Clarification that the building permit levy is also payable to the permit authority for illegal building works where either a permit to proceed or a permit of substantial compliance has been granted. Owners who have performed or allowed illegal building should not escape payment of the building permit levy.

(e) Provides that if there is a \$25,000 variation in the building work that exceeds the contract price or an estimate of the cost of the work, then the owner must notify the permit authority. A \$25,000 increase would attract a further \$25 levy payment.

If on completion of the work, the actual cost of the work differs by \$25,000 or more from the contract price or the estimate of the cost of the work, then the owner shall either:

- Pay the extra levy for any work that is greater than the contract or estimate; or

- Receive a part refund of the levy paid if the cost of the work was less than the contract or estimate provided.

#### **Clause 105 Section 270A inserted**

##### **Offence for non-payment of levy**

New section creates an offence and provides a penalty where an owner has commenced building work and has not paid the due building permit levy.

#### **Clause 106 (Additional orders)**

It is the general manager of a council who has the responsibility for enforcement of the provisions of Act, not the council's permit authority.

Subsection (3)(b) is amended as a consequence of the transfer of the appeal functions of the Building Act to the Resource Management and Appeal Tribunal.

#### **Clause 107 (Registers)**

Clarifications:

(a) In s.278 (h) - Permit authorities do not issue building orders (the general manager does); so this reference needs correction;

(b) & (c) The requirement that the permit authority keep a register of the Permits of Substantial Compliance which it has issued, needs to be added to this list for completeness.

#### **Clause 108 (Section 280A inserted)**

Savings and Transitional Provisions in Schedule 3A have effect.

#### **Clause 109 (Schedule 2 repealed)**

Schedule 2 which related to the membership and meetings of the Appeal Board is no longer required as a consequence of the transfer of the appeal functions of the Building Appeal Board to the Resource Management and Appeal Tribunal.

#### **Clause 110 (Schedule 3A inserted)**

Schedule 3A continues the immunity from liability of former members of the abolished Building Appeal Board and provides procedural guidance for matters currently before the Appeal Board when the Act is amended.

### **PART 3 BUILDING REGULATIONS 2004 AMENDED**

#### **Clause 111 – 114**

These building regulations are amended as a consequence of the transfer of the appeal functions of the Building Appeal Board to the Resource Management and Planning Appeal Tribunal.

### **PART 4 DRAINS ACT 1954 AMENDED**

#### **Clause 115 - 119**

The Drains Act is amended as a consequence of the transfer of the appeal functions of the Building Appeal Board to the Resource Management and Planning Appeal Tribunal.

### **PART 5 FIRE SERVICE ACT 1979 AMENDED**

#### **Clause 120 - 121**

The Fire Service Act is amended as a consequence of the transfer of the appeal functions of the Building Appeal Board to the Resource Management and Planning Appeal Tribunal.

### **PART 6 LOCAL GOVERNMENT (SAVINGS AND TRANSITIONAL) ACT 1993 AMENDED**

#### **Clause 122 - 123**

This Act is also amended as a consequence of the transfer of the appeal functions of the Building Appeal Board to the Resource Management and Planning Appeal Tribunal.

### **PART 7 PLUMBING REGULATIONS 2004 AMENDED**

#### **Clause 124 - 125**

The Plumbing Regulations are amended as a consequence of the transfer of the appeal functions of the Building Appeal Board to the Resource Management and Planning Appeal Tribunal.

## **PART 8 RESOURCE MANAGEMENT AND PLANNING APPEAL TRIBUNAL ACT 1993 AMENDED**

### **Clause 126 - 127**

The RMPAT Act is amended as a consequence of the transfer of the appeal functions of the Building Appeal Board to the Resource Management and Planning Appeal Tribunal.

The membership of the Appeal Tribunal is increased to include persons with specialist expertise in building, architecture, building surveying, plumbing, Local Government, disability access to buildings and environmental health to reflect the expertise which was formerly available to the Building Appeal Board.

## **PART 9 STRATA TITLES ACT 1998 AMENDED**

### **Clause 128 - 129**

This Act is amended as a consequence of the transfer of the appeal functions of the Building Appeal Board to the Resource Management and Planning Appeal Tribunal.

## **PART 10 WATER AND SEWERAGE INDUSTRY ACT 2008 AMENDED**

### **Clause 130 - 133**

This Act is amended as a consequence of the transfer of the appeal functions of the Building Appeal Board to the Resource Management and Planning Appeal Tribunal.

## **PART 11 REPEAL OF ACT**

### **Clause 134 (Repeal of Act)**

A procedural clause to repeal this amending Act.