

**Legislative Assembly for the
Australian Capital Territory**

Building (General) Amendment Regulation 2013 (No 1)

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Explanatory Statement

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Simon Corbell MLA
Minister for Environment and Sustainable Development
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Overview

General

The *Building (General) Regulation 2013* (“the regulation”) is made under the *Building Act 2004* (“the Act”).

An objective of the Act is to regulate the construction, alteration, demolition, use and occupancy of buildings and structures, to help ensure buildings and structures and building work meet reasonable standards of safety, structural stability, fire spread, amenity, access, and energy efficiency. The Act relies on the Building Code of Australia (the Code) to prescribe many of the relevant technical standards that buildings and structures must be built to. The Code has similar objectives to the Act.

The Act, section 152 (Regulation making power), entitles the ACT Government Executive to make regulations for the Act. That power is particularly wide-ranging in that section 152 (2) permits a regulation to exempt a building or building work from the application of the Act, or part of the Act, whether directly, or by further instrument, or conditionally or otherwise.

An intention of that power is to permit the regulation to be used to respond to circumstances where applying all or part of the Act is not appropriate, particularly because of the minor nature of certain buildings and structures and their comparatively low safety, or other, risks. It is generally not practical or cost effective to apply all of the Act’s requirements to such buildings. However, the regulation can apply to any building in any circumstances.

Historically, the Act and its predecessors in function have been complimented by regulations that have prescribed types of buildings or building work that are exempt from all or part of the Act. For example, it has been proven to not be cost effective to require licensed builders to install pool fencing, so the regulation prescribes exemptions from the parts of the Act that require such fencing to only be installed by the holder of a builder’s licence. However, because pool fencing can help prevent pool injuries or drowning, the relevant exemption is cast to be conditional upon certain things being in place, including that a building certifier certifies that the fencing complies with the Code, as per the regulation, section 6, and schedule 1, part 1.3, item 13, column 4.

Purpose

The subject amending regulation, (“this regulation”) is to amend the regulation, primarily to insert provisions to prescribe for further exemptions from a part of the Act, providing certain conditions are satisfied. This is necessary as it is impractical to apply the provisions of the Act that prohibit occupancy of buildings to a number of pre-existing dwellings and their associated buildings. The dwellings are generally based on caravans with attached rigid annexes, and associated buildings, at the Narrabundah Long Stay Park, block 8 section 97 Symonston, ACT, (the “Park”).

Until recent years, the Park was referred to as a caravan park, and many people placed caravans on sites in the park that they occupied under agreements permitting the occupancy. The agreements do not transfer land title to those occupants, and do not transfer ownership of the caravans or other improvements made by the occupants to the landowner, in the normal course of occupancy. Over time, many dwellings at the Park have grown from being mere caravans to include rigid annex extensions to caravans and transportable homes.

Historically, the Act and its predecessors in function have not regulated the placement and use of caravans or caravan annexes, where they are not used as a building for long-term habitation. There is no precise provision in the Act that delineates between using a caravan for camping or holidaying, and using a caravan as a long-term dwelling. The latter use tends to make the caravan fall within the Act’s purview; as such a use is in many relevant respects the same as placing a transportable house and using it as a long-term dwelling.

However, because many of the relevant buildings at the Park started off as caravans, the ongoing use, and adaption as long-term dwellings, particularly their extension with rigid annexes, without compliance with the Act or the Code, has resulted in many of the buildings falling short of the requirements of dwellings under—

- the Act; or
- relevant laws that applied to building a dwelling or placing a transportable dwelling at the times that the caravans and annexes were placed in the Park.

The Act applies to carrying out work to buildings, unless the building work is exempted. Thus, carrying out further building work to enhance the structural stability, fire protection, amenity, etc, of the relevant buildings must comply with the Act. In particular, the Act, section 42, requires building work to be done in accordance with the Code. Such provisions do not require the pre-existing buildings to be brought into Code or Act compliance, but rather, they require new work to the buildings to comply, despite older parts of the building not necessarily complying.

The Narrabundah Long Stay Park Project

Title to the land of the Park last transferred from a non-Government lessee property developer to the ACT Government, as the Park's occupants faced eviction. That was a complicated transaction during 2006 to 2008.

An options paper on the future ownership and management of the Park prepared by SGS Economics and Planning identified a number of health and safety concerns at the Park and, following a detailed compliance assessment of all the Park's dwellings, the ACT Government agreed to commence the Narrabundah Long Stay Park project and provided funding of \$7.7 million in the 2011-12 ACT Budget to address concerns.

Safety concerns included matters related to building fire protection, structural sufficiency, health and amenity, and electrical, plumbing and gas services safety, amongst other things.

The Narrabundah Long Stay Park project includes:

- capital works to install 19 new mobile homes as an affordable housing option;
- works to be undertaken by the Territory (e.g. essential plumbing work and electrical work and the installation of smoke alarms);
- means-tested grants and/or loans towards the costs of rectification work, relocation to alternative accommodation, or dwelling replacement; and
- financial assistance for affected occupants.

Occupancy of Structures at the Park

The Act, section 76 (1) (b), (Occupancy and use of buildings), in effect prohibits the use of a building, or part of a building, if the registrar under the Act has not issued a certificate under the Act, for the building or part. Section 76 (4) disapples that prohibition to a building for which a certificate of regularisation has been issued under the Act. So, taken together, those provisions require either a certificate of occupancy ("C of O") or a certificate of regularisation ("C of R") to be issued for a building or part of building, as a mandatory prerequisite to occupancy or use of the building or part, unless the building or part is exempted from the Act, section 76. Provisions relating to obtaining a C of O or C of R are provided in the Act at section 69 (Certificates of occupancy) and section 74 (Government buildings—application for fitness certificate), and section 75 (Decision on s 74 application).

While an application under the Act, section 69, for a C of O, or a C of R under section 74, could be made for the relevant buildings, it is unlikely such an application would be successful in many, but not all, cases. That is due to the some of the buildings not

having been built in accordance with a relevant law or the Code, or a predecessor in function of the Code, and the following kinds of non-standard construction exhibited by many of the buildings—

- insufficient ceiling heights—it is generally not practical to resolve this issue due to costs;
- insufficient subfloor clearances above the ground—it is generally not practical to resolve this issue due to costs;
- insufficient fire separation between buildings and insufficient fire resistant construction—generally resolvable;
- insufficient structural resistance to wind loads—generally resolvable.

For self-evident reasons it is not desirable that occupants be permitted to continue to occupy dwellings in the Park that are at above-normal risk of fire damage or wind damage, considering those deficiencies are resolvable. However, such rectification work is subject to the Act, and because of section 76, any resultant enhancements to the buildings cannot be used unless a C of O or C of R is issued for the parts of the building produced by the building work, such as fire walls, or structural tie-down footings and steelwork.

C of Os and C of Rs are usually an enduring instrument, intended to permit occupancy of buildings for the life of the building, all things being equal. The non-standard nature of some of the subject buildings is such that an enduring certificate is not appropriate.

Considering the above, there is a need to be able to permit occupancy or use of the relevant buildings when they have their resolvable deficiencies addressed, but a C of O or C of R is not an appropriate instrument to do so in the circumstances of such non-standard buildings.

Therefore, it is necessary to make the buildings exempt from the Act, section 76, to allow occupation and use of the buildings in the absence of a C of O or C of R for the buildings. A practical way to achieve that is through amendment to the regulation to prescribe the exemption. However, in order to help ensure the dwellings have minimum levels of safety, such an exemption ought to be subject to conditions that help ensure the buildings are:

- fit for occupation as a non-standard building if used only for the appropriate purpose; and
- structurally sound and can withstand loadings likely to arise from its use as a non-standard building;
- contain reasonable provision for the safety of people likely to be in the building if there is a fire, including—

- adequate facilities for leaving the buildings; and
- the prevention and suppression of fire; and
- the prevention of the spread of fire.

This regulation gives effect to such an exemption, subject to conditions that address those safety aspects.

It does so by inserting into the regulation, a new item, item 26, at the end of the existing schedule 1 (Exempt buildings and building works), part 1.3 (Exemption from application of Act), in respect of any building on the land that is the Park. This regulation also inserts into that schedule the conditions that must be met for the exemption to apply to the relevant building or part of a building at the Park.

The exemption is intended to apply to any building, including a caravan, on or attached to the land at block 8 section 97 Symonston, ACT, so long as the respective conditions of the exemption are met. It is not intended that the exemption should cause the registrar to refuse to issue a C of O or C of R for a building or part of a building, where the registrar believes it is appropriate to issue that kind of certificate.

It is intended that the written statement that the conditions of the exemption require to be issued as part of complying with the conditions, be regarded as a certificate that regularises the occupancy of the relevant building or part in a similar way that a certificate of regularisation under section 75 of that Act does, except that the statement is not intended to exist indefinitely, as provided for in the conditions of the exemption.

It is intended that the exemption only apply to the building to which the conditions of the exemptions apply, and that if the building is materially altered it be taken as no longer being the building that the conditions originally applied to.

Without the amendments provided by this regulation, ongoing occupancy of the relevant building is jeopardised, as section 76 of the Act, could prevent occupancy.

DETAILS

A detailed explanation of each clause of this Regulation follows.

Clauses

Clause 1 Name of Regulation

The first clause of this regulation declares the name of this regulation.

Clause 2 Commencement

This clause stipulates that this regulation commences on the day after its notification day, which means the day after it is notified on the ACT legislation register.

Due to the operation of section 75(1) of the *Legislation Act 2001* (“the Legislation Act”) the naming and commencement provisions of this regulation, clauses 1 and 2, commence automatically on the day this regulation is notified on the ACT legislation register. A note to that effect is included in the provision.

Clause 3 Legislation amended

This provision states the legislation that this regulation amends—the *Building (General) Regulation 2008*.

Upon commencement this regulation will amend the regulation in accordance with the provisions that this regulation contains. This regulation will then be immediately repealed.

Consequentially, from the date that this regulation commences a new republication of the regulation will be available. That new republication will feature the alterations made by this regulation.

Clause 4 Section 6 (3)

Clause 4 inserts the words “(other than a building mentioned in item 26)” after the words “part 1.3” in the regulation, section 6 (3), so as that provision when amended will read:

- (3) Also, a building or building work mentioned in schedule 1, part 1.3 (other than a building mentioned in item 26) is not exempt if building work at the building may affect—
 - (a) the structural integrity of any part of a building for which a certificate under the Act, part 5 (Building occupancy) has been issued; or
 - (b) a fire-rated wall, ceiling or floor; or

- (c) a ventilation or air-handling system, fire protection system or other mechanical service; or
- (d) a fire-escape, emergency lift, stairway, exit or passageway to an exit; or
- (e) the natural light or ventilation available to a building for which a certificate under the Act, part 5 (Building occupancy) has been issued; or
- (f) the building in a way that reduces its compliance with the building code to a level that is less than the minimum requirements of the code.

Example—par (f)

A house built in 1996 complies with the building code as in force in 1996 (the *1996 building code*). Although the house was not required to be energy-efficient under the 1996 building code, the house has an energy efficiency rating of 3 stars under the building code as currently in force. If building work on the house alters the house in a way that causes its energy efficiency rating to drop below 3 stars, the building work is not exempt under sch 1, pt 1.3.

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

That is necessary to ensure that building work done on a building at the Park can be made use of subject to the new item 26 exemption, even if that work affects any of the kinds of things mentioned under section 6 (3) (a) to (f). Otherwise work that affects those kinds of things would be subject to the Act, section 76, which would not resolve the problems that the new item 26 exemption resolves. The new column 4 conditions of the item 26 exemption will check that the relevant matters mentioned in section 6 (3) are adequately addressed as part of complying with the item 26 exemption.

Clause 5 Section 6 (5)

Clause 5 omits the words “items 1 to 24” from the regulation, section 6 (5), and substitutes those words with “items 1 to 26 (other than item 25)”, so that section 6 (5) will read when amended:

- (5) Also, building work mentioned in schedule 1, part 1.3, items 1 to 26 (other than item 25), is not exempt if the building work—
 - (a) involves—
 - (i) handling asbestos; or
 - (ii) disturbing friable asbestos; and
 - (b) is not minor maintenance work.

The above mentioned item 25 prescribes an exemption for doing certain asbestos work. The affect of clause 5 is necessary to ensure that building work done to any building in the Park, that involves handling asbestos, or disturbing friable asbestos, is not subject to the new item 26 exemption, unless the asbestos work is minor maintenance work. The term minor maintenance work is defined in the regulation, section 6 (6). That is to say that asbestos work at the Park, that is not minor maintenance work as prescribed by the regulation, section 6 (6), is intended to be

subject to the Act, section 76, and would therefore require a C or O or C of R. It is not in the public interest to allow the relevant asbestos work to be done without the process and compliance checks that obtaining a C of O or C of R provides.

Without the affect of clause 5, relevant asbestos work could be carried out in the Park without the checks and balances that requiring a C of O provides through the Act, part 5, which includes section 76.

Clause 6 Schedule 1, part 1.3, new item 26

Clause 6 inserts a new item, item 26, into the regulation at the end of the existing schedule 1 (Exempt buildings and building works), part 1.3 (Exemption from application of Act).

The Act, section 152 (Regulation making power), entitles the ACT Government Executive to make regulations for the Act. That power is particularly wide-ranging in that section 152 (2) permits a regulation to exempt a building from the application of the Act, or part of the Act, whether directly, or by further instrument, or conditionally or otherwise.

The regulation, section 6, provides that a building or building work mentioned in schedule 1, part 1.3, is exempt from the application of the parts of the Act stated in column 3 subject to any condition mentioned in column 4 for the building or building work.

New item 26 consists of entries across the 4 columns of the schedule, as follows.

Column 1 prescribes the new item number—26.

Column 2 prescribes the description of the exempt building or building work as—“building in block 8 section 97 Symonston”. That block is the parcel of land that constitutes the Narrabundah Long Stay Park, despite referring to the district named “Symonston”, rather than “Narrabundah”, as the Park is not located in the district named “Narrabundah”.

An intention is that the kinds of building or building work that the exemption applies to includes any existing or new building on or attached to land at block 8 section 97 Symonston. That applies to pre-existing buildings, alterations to those buildings, and buildings erected or altered at a future time. Although, the issues that the new exemption address are limited to certain pre-existing buildings, the scope of the new exemption is intended to cater for any such issues if they arise on those and any other buildings in the Park. That could cater for any future repairs to damage to the subject buildings for example, or anomalies discovered in other buildings in the Park. Although the new exemption could, in theory, apply to a newly constructed building that was constructed in accordance with current laws and the Building Code, it is not

the intent that the new exemption be applied in that case, as it is in the public interest to ensure that such new buildings are certified by the registrar with a C of O. That provides a check that all relevant provisions of relevant laws and the Code have been met, rather than only checking on the matters prescribed under new item 26, column 4. For that reason it is likely the registrar would refuse to issue a column 4 statement for a building at the Park when a C of O, or C of R, can be obtained for the building.

The Act, section 7 (1) (e) provides that the meaning of term “building” includes “part of a building”, and therefore the exemption can apply to all or part of a building at the Park.

Column 3 prescribes the provisions of the Act that the relevant building or building work is exempt from as—

- (a) s 12 (Exempt buildings); and
- (b) s 76 (Occupancy and use of buildings).

It is necessary to exempt the Park from the application of section 76 for reasons outlined in the overview part of this explanatory statement. However, the conditions of the exemption will restrict the exemption from applying except in narrowly prescribed circumstances, as explained for column 4. Section 76 prohibits occupancy of buildings without a C of O or C of R, and provides offences for contravention. It is unlikely many of the subject buildings will be eligible for the issue of a C of O or C of R due to their non-standard nature. It is not feasible to bring them up to a standard required for an unconditional C of O or C of R.

Section 12 provides for exempt buildings to be exempt from a wider range of provisions of the Act than just section 76. It is therefore necessary to exempt the Park from the application of section 26, in order to not otherwise exempt the Park from a wider range of Act provisions than section 76.

Column 4 prescribes the conditions that must be met for the exemption to apply to a building or part of a building, as follows—

the construction occupations registrar—

(1) has issued a written statement—

- (a) attaching a plan showing the location and footprint of the building; and
- (b) stating that the registrar is satisfied that the building—

- (i) is fit for occupation as a non-standard building if used only for a stated purpose; and
 - (ii) is structurally sound and can withstand loadings likely to arise from its use as a non-standard building; and
 - (iii) contains reasonable provision for the safety of people likely to be in the building if there is a fire, including—
 - (A) adequate facilities for leaving the building; and
 - (B) the prevention and suppression of fire; and
 - (C) the prevention of the spread of fire; and
 - (c) stating that the registrar may withdraw the statement; and
- (2) has not withdrawn the statement and notified the occupier in writing.

Those conditions are explained as follows.

The “construction occupations registrar” is defined in the *Legislation Act 2001*, dictionary, part 1 (Meaning of commonly-used terms) as—

construction occupations registrar means the Australian Capital Territory Construction Occupations Registrar under the *Construction Occupations (Licensing) Act 2004*.

Therefore where the condition refers to that registrar, that reference has that meaning. That registrar is the main administrator of the Act’s provisions, and is empowered by the Act, part 5, to determine if buildings are suitable for occupancy, and to grant occupancy certificates and certificates of regularisation, which permit occupancy, under that part. Those functions are similar to the function of issuing the statement required by the column 4 conditions.

Section 1 (a) of the condition prescribes what is required of plans needed as part of complying with the column 4 conditions. Plans are necessary to help correlate the relevant statement by the registrar with the respective building at the respective point in time. An intention is that the registrar’s statement only applies to the building shown in the plans at the time the statement is given. It is intended that the statement can continue to cover a relevant building shown in those plans so long as the building is not materially altered. A material alteration that brings the building out of compliance with the plan would prevent the statement from covering the altered building, and

would thereby prevent the condition from being satisfied for the altered building. In that case the exemption would not apply to the building as altered.

However, for that case, the registrar could consider issuing a fresh statement for the altered building as shown in a fresh plan.

It is not intended that the plans show all details of the building. It is intended that the plans only show sufficient information to show the location and arrangement of the building's footprint, rather than needing to show floor plans or elevations, etc.

The requirements of section 1 (b) of the column 4 conditions are based on the comparable provisions of the Act, section 75 (Decision on s 74 application). Those section 74 provisions relate to the registrar issuing a certificate of regularisation for buildings. The function of such certificates is comparable to the function of the registrar's statement under the column 4 conditions—to provide a check on the building's key safety aspects before permitting occupancy.

Section 1 (c) requires the registrar to state in the statement under column 4, that the registrar may withdraw the statement. That is to make it clear there is no implied enduring force of the statement because the registrar may withdraw the statement. An intention is that such withdrawal would stop the column 4 condition from being met, and thus stop the item 26 exemption from operating for the respective building, provided the requirements of section (2) of column 4 apply.

Section (2) of column 4 prescribes that a column 4 condition that must also be met for the item 26 exemption to operate is that the registrar has not withdrawn the statement mentioned in section (1) of column 4, and notified the occupier of the withdrawal. An intention is that such withdrawal would stop the column 4 condition from being met, and thus stop the item 26 exemption from operating for the respective building.

An intention is that in order for the registrar to withdraw the statement and effectively prevent the exemption from operating, the registrar must also notify the landowner of the withdrawal, and that section (2) take effect from the time that the landowner is notified of the withdrawal, in accordance with when the Legislation Act provides for such notice to be taken to have been given, as the case requires.

Costs and other Regulatory Impacts

The effect of the proposed law is only to relieve the regulatory burden that the Act, section 76, imposes upon the occupants of the relevant buildings at the Park. Costs of bringing the relevant buildings up to standards required for the exemption condition to be met are covered by the Government's Park upgrade program, although some occupants are self-funding some non-mandatory work. The proposed law does not create an obligation upon any entity to comply with the exemption or to obtain the statement needed for the exemption to apply or to do anything to any building. However, failure to comply with the exemption could mean that the status quo applies in relation to relevant buildings failing to comply with the Act, s 76, and therefore potentially affecting the ongoing occupancy of the buildings. The proposed law does not cause section 76 to apply, but can provide relief from it.

Asking the registrar to provide the statement required for the exemption to apply will require the registrar to consider the request and respond to it as the registrar sees fit, but that is anticipated to be an insignificant additional burden as the registrar is responsible for responding to thousands of comparable requests for C of Os each year, and the total number of relevant requests is expected to be around 40 in total spread over a number of months.

Thus, the proposed law only provides for matters that do not operate to the disadvantage of anyone (other than the Territory or a territory authority or instrumentality) by adversely affecting the person's rights or imposing liabilities on the person.

Therefore, under the *Legislation Act 2001*, section 36 (When is preparation of regulatory impact statement unnecessary?), a regulatory impact statement for the amending law is not required to be prepared under the Legislation Act.