

2015

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

BUILDING (GENERAL) LEGISLATION AMENDMENT REGULATION 2015 (No 1)

Subordinate law SL2015-14

EXPLANATORY STATEMENT

Presented by
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EXPLANATORY STATEMENT

This explanatory statement relates to the *Building (General) Legislation Amendment Regulation 2015 (No 1)*, herein referred to as the “amending regulation”, as presented to the ACT Legislative Assembly. This statement has been prepared in order to assist the reader of the amending regulation and to help inform legislative debate on it. This statement does not form part of the amending regulation and has not been endorsed by the ACT Legislative Assembly.

This statement is to be read in conjunction with the amending regulation. It is not, and is not meant to be, a comprehensive description of the amending regulation. What is said in this statement about a provision is not to be taken as an authoritative guide to the meaning of a provision—that is a task for courts.

Background and overview

The amending regulation makes exemptions to compliment recent other legislative changes to facilitate better regulation of asbestos work on buildings, and demolition of building that contained loose-fill asbestos, sometimes referred to as “Mr Fluffy” asbestos buildings, recognising a nickname of a 1970s ACT installer of loose-fill asbestos.

At the time of drafting the amending regulation the ACT Government was about to commenced demolition of the first of up to one thousand Mr Fluffy ACT houses in an asbestos eradication program. Speculation about the future reach of the program to home owners who might not want to transfer their premises to the Government or to not have their home demolished creates incentives for owners to hide the asbestos status of their home.

An intention of part of the amending regulations to provide a new warning on plans for future work on Mr Fluffy houses, and other buildings, or connected buildings, that contained loose-fill asbestos, to warn of the potential asbestos risk. That will make it difficult to conceal the asbestos risks associated with doing work on such buildings, and will help alert workers and building occupants to the hazard.

Other provisions of the amending regulation are a consequence of a name change to a prescribed utility services provider, and to cater for new utility operators who may enter the ACT’s regulated utilities sectors, which has recently been expanded to include smaller-scale utility service providers than traditionally regulated under utility licenses under the *Utilities Act 2000*.

The smaller utilities are now regulated under the *Utilities (Technical Regulation) Act 2014*—not under the *Utilities Act 2000*, which continues to regulate the large utilities.

The amending regulation also narrows the scope of licensable work for builder’s licenses, to exclude low risk buildings and structures that are exempt from the relevant provisions of the Building Act, such as certain fences, small structures, small retaining walls, etc. Although that has historically been assumed to be the case, it has not been clear in law.

Part 1 Preliminary

Section 1 Name of regulation

Section 1 of the amending regulation names the amending regulation the “*Building (General) Legislation Amendment Regulation 2015 (No 1)*”, so it may be cited by that name.

Section 2 Commencement

Section 2 (1) of the amending regulation stipulates that the amending regulation commences on the day after its notification day, which means the day after it is notified on the ACT legislation register; except for sections 9 and 10 of the amending regulation. Section 2 (2) stipulates that sections 9 and 10 of the amending regulation commence on the later of the follow events—

- (a) 1 day after the commencement of section 3 of the amending regulation; and
- (b) the commencement of section 3 of the *Dangerous Substances (Loose-fill Asbestos Eradication) Legislation Amendment Act 2015*.

That delayed commencement of sections 9 and 10 of the amending regulation is necessary to anticipate the commencement of the *Dangerous Substances (Loose-fill Asbestos Eradication) Legislation Amendment Act 2015*, as sections 9 and 10 of the amending regulation refer to provisions of that Act. If that Act never commences, then sections 9 and 10 of the amending regulation will not commence. If that Act commences before section 3 of the amending regulation, then sections 9 and 10 of the amending regulation will not commence until section 3 of the amending regulation commences.

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

Section 3 Legislation amended

Section 3 of the amending regulation provides that the amending regulation amends the two laws listed in that section, being the—

- *Building (General) Regulation 2008*; and
- *Construction Occupations (Licensing) Regulation 2004*.

Upon commencement of the amending regulation’s relevant provisions, they will accordingly amend those laws. The amending regulation will automatically repeal after its commencement, but its provisions with delayed commencement will continue to have their delayed effect despite the repeal.

From soon after the respective provisions commence and take effect, a new republication of the amended laws will be available. The new republication will feature the amendments made by amending regulation.

Section 4 Legislation amended

Section 4 of the amending regulation provides that it repeals the legislative instrument named the *Building (General) (Asbestos Handling Occupation and Qualification) Declaration 2009 (No 1)*, which has notifiable instrument number *NI2009-317*. It is desirable to repeal that instrument because section 13 of the amending regulation makes a substitution that in effect omits the only provisions that rely on that instrument, and so the instrument will be of no effect or purpose after the amendment. Despite who made that instrument, it can be repealed by the amending regulation.

Part 2 Building (General) Regulation 2008

Part 2 of the amending regulation amends the *Building (General) Regulation 2008*, referred to herein as the “Building Regulation”.

Section 5 Section 3, note 1

Section 5 of the amending regulation substitutes note 1, in section 3 of the Building Regulation, with a new note 1, as prescribed in section 5 of the amending regulation. The main difference between the unamended note 1, and the amended version, is that the amended version does not contain an example of a definition with the term ‘**ActewAGL Distribution**’.

The substitution of the note is necessary because sections 14 and 16 of the amending regulation omit from the Building Regulation all definitions of ‘**ActewAGL Distribution**’. For details of why that definition is omitted, see the explanation for section 15 of the amending regulation.

Section 6 New section 6 (3A)

Section 6 of the amending regulation inserts into the Building Regulation, a new subsection numbered (3A), under section 6, referred to as new ‘section 6 (3A)’. New section 6 (3A) prescribes that subsection (3), under section 6, of the Building Regulation, does not apply to building work mentioned in schedule 1, part 1.3, item 25A, of the Building Regulation, if the parameters prescribed at new paragraphs 6 (3A) (a), (b) and (c) are all satisfied. That new item 25A is inserted by section 13 of the amending regulation.

Section 6 of the Building Regulation, in part, prescribes which buildings or building work are exempted from the application of the Building Act, or from parts of that Act, by referring to exemption schedules in schedule 1 of the Building Regulation.

Subsection (3), under section 6, or in other words—section 6 (3), of the Building Regulations—prescribes the conditions under which a building or building work mentioned in schedule 1, part 1.3 (other than a building mentioned in item 26) of the Building

Regulation are not exempt under section 6. Namely, exemptions do not apply 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.

An intention of section 6 of the amending regulation is to ensure that section 6 (3) of the Building Regulation does not prevent building work mentioned in schedule 1, part 1.3, item 25A, of the Building Regulation, from being exempted under section 6 (2) of the Building Regulation, if the parameters prescribed at new paragraphs 6 (3A) (a), (b) and (c) of that Regulation are all satisfied.

That is necessary to ensure that the parts of the Building Act that require a building certifier, building approval, licensed builder, inspection and certification, etc, do not unduly apply to a licensed asbestos assessor's work of merely taking sample of building materials from a building to test for asbestos content. Such sampling amounts to doing building work, for the purposes of the Building Act's section 6, by virtue of the Building Regulation prescribing at section 5, for the Act's section 6, that building work includes building work that involves handling asbestos or disturbing friable asbestos. Examples in that section 5 include an example of handling asbestos or disturbing friable asbestos, which includes removal of asbestos or cutting a hole in sheet of asbestos.

Usually sampling building materials suspected of being asbestos cement sheet involves scrapping or cutting a hole in the sheet's surface, albeit not deeply into the surface, nor completely through the sheet. Such sampling alters the sheet and removes asbestos, if the sheet contains asbestos, and thereby amounts to doing building work for the purposes of section 6 of the Building Act. Therefore, the parts of the Act that require a building certifier, building approval, licensed builder, inspection and certification for building work apply to sampling, unless they are exempted from applying. The cost and time imposts of those requirements are not justified for merely taking small samples where the sampling will not be detrimental to the building or occupants.

The parameters under new section 6 (3A) are intended to ensure the sampling will not be detrimental to the building or building occupants, by requiring that—

- (a) the building work [ie the sampling of material from the building] complies with the minimum requirements of the building code [ie the Building Code of Australia]; and
- (b) the building work does not reduce the thickness of the parent material from which the sample material is removed by more than 1mm; and
- (c) no dimension of the sample material is more than 10mm.

New item 25A has a complimentary safeguard of requiring that the handling, removing or sampling of the material must be done in accordance with any code approved under the *Work Health and Safety Act 2011* relating to asbestos. Such codes require such work to be done on the assumption that the material contains asbestos, even if the material's asbestos status is not known.

The following is an example of how new section 6 (3A) of the Building Regulation is intended to operate. A building has a fire resistant wall, rated to resist fire and heat for at least 60 minutes. The wall relies on its non-combustible wall sheeting to help achieve its rating. Substantively reducing the thickness of the wall sheeting substantively reduces the 60-minute rating. The building code requires the wall to have not less than a 60-minute rating. Taking a surface sample of the sheeting by removing material to a surface depth less than 1mm over an area with a dimension of no more than 10mm will not reduce the wall's rating by a demonstrable amount. The sampling will not cause non-compliance with any provisions of the building code. Section 6 (3) (b) of the Building Regulation ordinarily prevents building work that affects a fire rated wall from being exempted under schedule 1 of that Regulation. However, in this case, new section 6 (3A) of that regulation ensures that section 6 (3) (b) does not apply, because the parameters of new section 6 (3A) (a) to (c) are satisfied. Therefore, the above-mentioned new item 25A exempts the sampling of the fire rated wall from the parts of the Building Act that item 25A prescribes at column 3—namely—

- (a) part 3 (Building work); and
- (b) part 5 (Building occupancy); and
- (c) part 6 (Residential buildings—statutory warranties, insurance and fidelity certificates).

Those part of the Act include the requirements for a building certifier, building approval, licensed builder, inspection and certification, etc, all of which are not justified in this case.

Section 7 Section 6 (5)

Section 7 of the amending regulation omits from section 6 (5) of the Building Regulation, the bracketed phrase “(other than item 25)”, and substitutes it with the bracketed phrase “(other than item 25 and 25A)”. That is a consequence of section 13 of the amending regulation inserting a new item 25A into the Building Regulation's schedule 1, part 1.3, to exempt certain sampling of building materials for asbestos testing. Section 6 (5) of the Building Regulation otherwise prevents the exemptions in that schedule from applying if the building work involves asbestos. The amendment under section 7 of the amending

regulation ensures that the new item 25A exemption for sampling materials for asbestos is not negated by section 6 (5) of the Building Regulation. New item 25A prescribes inherent asbestos risk safeguards for the sampling it exempts.

Section 8 New section 18A

Section 8 of the amending regulation inserts into the Building Regulation, a new section numbered 18A, entitled “Building approval applications—asbestos warning notices—Act, s 152 (3) (b)”. An overall intent of new section 18A is to require the building certifier who is assessing an application for building approval, to mark the building approval plans with a warning that a building shown in the plan, or a building connected to such a building, might have contained loose-fill asbestos fibres. Generally, the plans must only be marked that way if the building, or connected building, is in a prescribed area, and the ACT construction occupations registrar has advised the certifier in writing that the registrar has records indicating that the building or connected building contained loose fill asbestos. However, additionally, the plans must also be marked that way if the certifier has information that the building or connected building contained loose-fill asbestos, even if it is not in a prescribed area and even if the registrar has not advised on the building or has advised that the registrar has no records of the building having contained asbestos.

A self-evident intention in requiring the plans to be so marked is to warn builders, and other workers who do work under the building approval plans, of the potential health risks inherent in working on the building or connected building. Loose-fill asbestos fibres have been associated with potentially fatal respiratory diseases.

It is not anticipated that the requirement to mark the plans will place a substantive additional burden on certifiers, as other provisions already require the certifier to determine if the building contained asbestos, and to mark the plans with other building approval information.

Explanations of the relevant provisions of new section 18A (1) of the Building Regulation are as follows.

New section 18A (1) of the Building Regulation provides that new section 18A applies not only to an application for building approval under the section 26 of the Building Act, (which is entitled “Building approval applications”), but section 18A also applies to an application for approval of amended plans under section 31 of that Act, (which is entitled “Application for approval of amended plans”).

New section 18A (2) of the Building Regulation requires the certifier to decide whether loose-fill asbestos insulation was installed in a building to which the building work, that is the subject of the application under the above-mentioned section 26 or 31, is to be done, or to a building connected to the first-mentioned building.

New section 18A (3) (a) of the Building Regulation prescribes the circumstances under which the certifier must decide that loose-fill asbestos insulation was installed in the building or connected building, for new section 18A (2). An intention is that if the prescribed applicable parameters exist, the certifier must decide that that loose-fill asbestos insulation was

installed in the building. That is the case even if there is doubt about the fact that a building or connected building actually contained such asbestos fibres, and despite the existence of evidence of that—the certifier must nevertheless mark the plans under new section 18A to avoid contravening that section. That is because respected experts profess that buildings that may have contained such asbestos fibres could be thoroughly tested for the presence of such fibres, and despite all test results indicating a lack of fibre detection, there still could be residual asbestos fibres impregnated in the building fabric, or sitting loosely in confined spaces inaccessible to testing.

One of the parameters of new section 18A (3) (a) is that the building, or connected building, must be in a prescribed area. New section 18A (6) entitles the ACT construction occupations registrar to prescribe the above-mentioned areas. An intention in prescribing such areas is to reduce the number of instances that the registrar would need to be asked if the registrar has records of the building containing loose-fill asbestos. That system of reducing those instances was negotiated at a consultation meeting with many ACT licensed building surveyors, who are the only entities entitled to be appointed as building certifier under the Building Act. That system became the preferred model of the Government official and certifiers at the consultation meeting.

New section 18A (3) (b) of the Building Regulation prescribes when the certifier must decide that loose-fill asbestos insulation was not installed in the building or connected building, for new section 18A (2). An intention is that if the certifier so decides, they must not mark the plan with the asbestos warning, as doing so can be detrimental to the building's value etc, due to the stigma of loss-fill asbestos buildings being a danger to health and impractical to remediate. An intention is that if the parameters of 18A are satisfied, the certifier must not mark the plans under new section 18A. Nevertheless, even if the relevant building is not in a prescribed area, and the registrar has indicated a lack of records about the building containing loose-fill asbestos, if the certifier does have any information indicating that loose-fill asbestos insulation was installed in the building or connected building, then new section 18A (3) (b) (ii) in conjunction with new section 18A (3) (a) (B), will require the certifier to decide that the building contained loose-fill asbestos, and to mark the plans under new section 18A. Failure to so mark the plans in that case would contravene new section 18A.

Nothing in new section 18A is intended to require the certifier to undertake research about the asbestos status or history of a building, other than to examine the information placed before them in applications for building approval, or amendments to building approvals, and documents arising from considering such applications under the Building Act, and making the normal due-diligence checks expected of a certifier in doing those things, including checking with the ACT construction occupations registrar for records about asbestos in the building.

New section 18A (4) of the Building Regulation requires the certifier to mark each page of the plans with an asbestos warning notice that loose-fill asbestos insulation was installed in the building, or connected building, before issuing an approval of the plans, if the certifier decides under section 18A that the building or connected building contained loose-asbestos. New section 18A (4) also includes a note reminding that if a form is approved under section

151 of the Building Act, for new section 18A (4), then the form must be used. It is intended that such a form will be approved for the loose-fill asbestos warning that must be marked on the plans.

New section 18A (5) of the Building Regulation prohibits the certifier from marking the plans with an asbestos warning notice that loose-fill asbestos insulation was installed in the building, or connected building, if the certifier decides under section 18A that the building or connected building did not contain loose-asbestos. An intention is that if the certifier so decides, they must not mark the plans, as doing so can be detrimental to the building's value etc, due to the stigma of loose-fill asbestos buildings being a danger to health and impractical to remediate.

New section 18A (6) of the Building Regulation entitles the ACT constructions occupations registrar to declare the above-mentioned prescribed areas. An intention in prescribing such areas is to reduce the number of instances that the registrar would need to be asked if the registrar has records of the building containing loose-fill asbestos. At the time of drafting the amending regulation, the ACT government had a policy position of not publicising a comprehensive list or map of the location of all houses it had records of that had contained loose-fill asbestos, to avoid adverse ramifications for the house owners or occupants. The registrar's power to declare prescribe areas is intended to not be inconsistent with that policy position, such as by prescribing areas that are much larger than the premises that contained the asbestos. For example, the registrar could declare a whole suburb, or a suburb other than listed excluded areas, such as comparatively new areas in suburbs like Macgregor and Lyneham that have newer and older parts, where the newer parts are generally understood to be too new to have been affected.

New section 18A (7) of the Building Regulation stipulates that a declaration of a prescribed area, under new section 18A (6), is a notifiable instrument. Under the Legislation Act, a notifiable instrument must be notified on the ACT legislation register, so that it is accessible to entities subject to the instrument.

New section 18A (8) of the Building Regulation defines the term "**connected building**" for new section 18A. It is intended that if a building is connected to a building mentioned in new subsection 18A (2) (a), in a way that loose-fill asbestos fibres could transfer between the buildings, then the first-mentioned building is a **connected building** in respect of the second-mentioned building. It is also intended that such connection could be by way of abutting the other building, being contiguous with it, or being physically attached or integrated with it. Otherwise, if the two buildings are completely separated by an air gap, then the buildings can be taken to be not connected.

It is intended that such a transfer of asbestos fibres be taken to have been able to have occurred between a building and a connected building through microscopic penetrations between the buildings, or during an infrequent event, if such an event is likely to have taken place. For example, it is often the case that townhouses and other connected buildings are separated by a firewall that is common to the townhouses either side of the wall. Even though such walls are often of masonry, and extend from ground to the underside of the roofing, if there are even microscopic penetrations through the masonry or other part of the

wall, or if the roofing could slightly lift up in strong wind, then the fibres could transfer between the buildings through, or over, the fire wall. See figure 1 below.

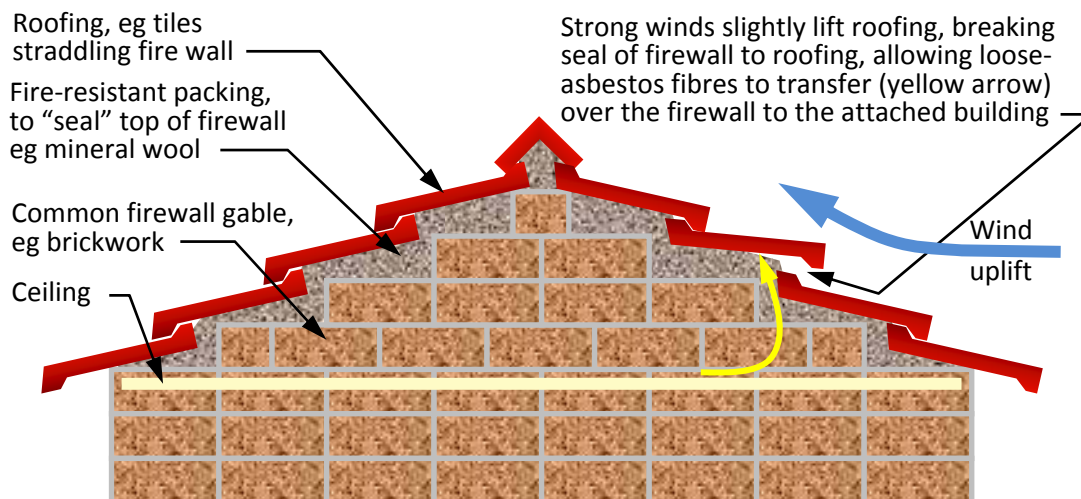


Figure 1 Typical cross section through roof space near common firewall connecting attached buildings

Section 9 New section 18A (3A)

Section 9 of the amending regulation inserts into the Building Regulation, under section 18A, a new subsection numbered (3A), also known as section 18A (3A). However, section 2 of the amending regulation provides that section 9 of the amending regulation, and thereby new section 18A (3A) of the Building Regulation, has a delayed commencement as explained above for section 2 of the amending regulation.

If, and when, section 9 of the amending regulation commences, the new section 18A (3A) will thereby be inserted into the Building Regulation, to supplement new section 18A (3). An intention is that where new sections 18A (3) (a) (B) and 18A (3) (b) mention certifiers having, or not having, as the case requires, any information indicating that loose-fill asbestos insulation was installed in the building or connected building, the certifier must be taken to have that information if the building or connected building is included on the ***affected residential premises register*** if the register is publicly available. See the explanation for section 10 of the amending regulation, below, for an explanation for the term ***“affected residential premises register”***.

Section 10 Section 18A (8), new definition of ***affected residential premises register***

Section 10 of the amending regulation inserts into section 18A (8) of the Building Regulation a definition of the term ***“affected residential premises register”***, because that term is used in new section 18A (3A) of the Building Regulation, and it requires a definition. However, section 2 of the amending regulation provides that section 10 of the amending regulation,

and thereby section 18A (8) of the Building Regulation, has a delayed commencement, as explained above for section 2 of the amending regulation.

If, and when, section 10 of the amending regulation commences, the new section 18A (8) will thereby be inserted into the Building Regulation, to supplement new section 18A (3A). An intention is that where the term “*affected residential premises register*” is mentioned in section 18A of the Building Regulation, it will refer to the register of that name under the *Dangerous Substances Act 2004*, section 47N. However, at the time of drafting the amending regulation, that section 47N had not commenced.

Section 11 Section 48

Section 11 of the amending regulation omits section 48 from that regulation. Section 48 is entitled “Occupations and qualifications—handling small amounts of bonded asbestos—Act, s 152”.

Section 48 prescribes a power for the construction occupations registrar to declare an occupation for, and a qualification for, schedule 1, part 1.3, item 25, of the Building Regulation, which is about handling small amounts of bonded asbestos.

Omission of section 48 is a consequence of section 13 of the amending regulation amending the above-mentioned item 25, so that it no longer refers to such occupations or qualifications. Item 25 is the only provision that relies on section 48. As explained for section 4 of the amending regulation, section 4 consequentially repeals the occupation and qualification declaration instrument made under section 48 of the Building Regulation.

Section 12 New part 22

Section 12 of the amending regulation inserts into the Building Regulation new part 22, entitled “Transitional—Building (General) Legislation Amendment Regulation 2015 (No 1)”.

New part 22 is intended to create a transitional arrangement to avoid building certifiers having to redo work they may have already done in relation to assessing an application for building approval, or for an amendment to a building approval. The arrangement is intended to provide that the amending regulation’s new section 18A, entitled “Building approval applications—asbestos warning notices—Act, s 152 (3) (b)” does not apply to such applications made to the certifier before the commencement day of the amending regulation. Section 2 (1) of the amending regulation prescribes that its commencement day is one day after it is notified on the ACT Legislation Register.

An intention is that if the application to the certifier is made before that commencement day, the certifier need not decide if the plans in the application relate to a building or connected building that contained loose-fill asbestos, for the purposes of marking plans under new s18A. The certifier will still have to be concerned about any history of such, or other, asbestos in the building, as part of complying with other requirements of the Building Act, etc, that deal with asbestos.

New section 114 of the Building Regulation provides that new part 22 expires one year after the above-mentioned commencement day, to serve as a year of reminder of its affect.

However, its expiry will repeal it, and thereby after repeal it will no longer appear in the republished Building Regulation, but it will continue to have effect after its expiration and repeal because of section 88 of the Legislation Act. Expiration and repeal of such provision helps ensure legislation text does not become cluttered with such provisions, while allowing them to continue to have effect.

Section 13 Schedule 1, part 1.3, item 25

Section 13 of the amending regulation substitutes the Building Regulation's Schedule 1, part 1.3, item 25, with a new item of the same number plus a new item numbered 25A.

The unamended item 25 prescribes an exemption for handling not more than 10m² of bonded asbestos, and new item 25 continues to do so.

An intention is that new item 25 is the same as the unamended item 25, except that the condition of the exemption, prescribed in column 4 of item 25, is that handling must be in accordance with the *Work Health and Safety Act 2011*. Whereas previously the conditions were that—

- (a) handling must be carried out by person who—
 - (i) works in an occupation declared by construction occupations registrar under section 48; and
 - (ii) has qualification declared by construction occupations registrar under section 48; and
- (b) handling must be in accordance with asbestos removal code.

Those conditions were rendered obsolete as follows. With effect from 1 January 2015, the *Dangerous Substances (Asbestos Safety Reform) Legislation Amendment Act 2014*, amended a suite of ACT laws, including the *Construction Occupations (Licensing) Act 2004*, the *Building Act*, and the *Building Regulation*, to in effect remove the main licensing and regulation of asbestos-related work from those Acts and regulations and to provide for their licensing and main regulation in ACT Dangerous Substances laws and Work Health and Safety laws. In doing so, doing exempt building work under the exemption provided for by the above-mentioned item 25, generally became licensable work under Work Health and Safety laws, making the above-mentioned conditions about occupations and qualifications redundant.

New item 25A creates a new exemption for building work that is the handling or removing of material, installed on a building, to sample for asbestos. Column 2 of new item 25A, describes that work, in an abbreviated form. Column 3 of new item 25A prescribes the parts of the Building Act that the sampling is exempted from as—

- (a) part 3 (Building work); and
- (b) part 5 (Building occupancy); and
- (c) part 6 (Residential buildings—statutory warranties, insurance and fidelity certificates).

Those part of the Act include the requirements for a building certifier, building approval, licensed builder, inspection and certification, etc, all of which are not justified in the case of

sampling in accordance with the exemption conditions prescribed in column 4 of new item 25—

- (a) no dimension of the material is more than 100mm; and
- (b) handling, removing or sampling material must be in accordance with any code approved under the *Work Health and Safety Act 2011* relating to asbestos.

Recent consultation with a number of licensed asbestos assessors indication that the 100mm limit on sample size would be adequate in all cases.

Note that section 6 (3) of the Building Regulation will prevent the new exemption at new item 25A from applying to building work that affects prescribed critical aspects of the building, such as fire rated elements. However, new section 6 (3A) can ensure section 6 (3) does not unduly prevent the exemption from applying, if the parameters of new section 6 (3A) are satisfied. One such parameter is that no dimension of the sampled material is more than 10mm. In that case, compliance with new 6 (3A) has a much smaller limit on sample size than new item 25A—10mm verses 100mm—to mitigate undue detrimental effects that taking a larger sample could have on critical parts of the building, such as a fire wall.

Sections 14 to 16

Sections 14 to 16 of the amending regulation respond to a change in name of a component of “ActewAGL Distribution”, which changed name to “Icon Water”. In order to avoid having to make similar changes in future and to cater for other utilities entering the regulated utility sector, sections 14 to 16 in effect—

- substitute all retained references to “ActewAGL Distribution” with a generic descriptor of the relevant utility under the *Utilities Act 2000* or the *Utilities (Technical Regulation) Act 2014*; and
- consequentially omit definitions of “**ActewAGL Distribution**”.

Part 3 Construction Occupations (Licensing) Regulation 2004

Part 3 of the amending regulation amends the *Construction Occupations (Licensing) Regulation 2004*; explained as follows.

Section 17 New part 1A

Section 17 of the amending regulation inserts into the Building Regulation a new part numbered “part 1A” entitled “Work in construction occupation”. That new part 1A only contains new section 4A of the Building Regulation, which is entitled “Construction occupation of builder—excluded work—Act, s 6 (3) (b)”.

An intention is to prescribe under new section 4A, work that is excluded from the construction occupation of a builder, for the purposes of section 8 of the *Construction Occupations (Licensing) Act 2004*, which is entitled “What is a builder?”

Section 6 (3) (b) of that Act provides a power for a regulation to exclude work from a construction occupation. Section 8 of that Act provides that a builder is an entity that provides, has provided or proposes to provide a building service, and that a building service is the doing or supervising of building work; where the term “building work” has the same meaning as in section 6 of the Building Act.

An intention is to use that regulation power to prescribe that building work in relation to an exempt building, or exempt building work, exempted under the Building Regulation, is work that is excluded from the construction occupation of a builder, for the purposes of *Construction Occupations (Licensing) Act 2004*, section 8. An intended outcome is that exempted building work, or work on an exempt building, not require a builder’s licence. That has historically been the accepted practice, but it has not been clear in the law.

The Building Regulation provides for such exemptions under one or more of the following provisions:

- section 7 (Minister may exempt buildings—Act, s 152 (2))
- schedule 1, part 1.2 (Exemption from application of Act)
- schedule 1, part 1.3 (Exemption from part of Act).

New section 4A (1) of the *Construction Occupations (Licensing) Regulation 2004* provides the abovementioned exclusion for a Minister’s exemption under section 7 of the Building Regulation, but only for the stated period mentioned in the Minister’s exemption, and subject to any condition mentioned in the exemption. Such a condition could state that the exempted work must be done, or supervised by the holder of a builder’s licence that authorises the work, despite the intent of the *Construction Occupations (Licensing) Act 2004* being to exclude such work from the scope of the construction occupation of “builder”.

It is envisaged that despite the more subordinate nature of a Minister’s exemption than section 8 of the *Construction Occupations (Licensing) Act 2004*, because the Minister’s exemption is made under the Building Regulation, its ability to be conditional upon the exempted work being done or supervised by a licensed builder, for example, will not be fettered by that Act’s section 8 otherwise excluding the work from requiring a licence under that Act. That is to say that the Building Regulation’s power to require a licence, through a condition of a Minister’s exemptions, will not be fettered by the *Construction Occupations (Licensing) Act 2004*, section 8, despite the latter relying on that exemption to otherwise provide to the contrary.

New section 4A (2) of the *Construction Occupations (Licensing) Regulation 2004* provides the abovementioned exclusion for exempted work or buildings under schedule 1, part 1.2 of the Building Regulation, subject to any applicable conditions under column 3 for that part. It is envisaged that the Building Regulation’s power to require a builders licence, through such a condition, will not be fettered by the *Construction Occupations (Licensing) Act 2004*, section 8, despite the latter relying on that exemption to otherwise provide to the contrary.

New section 4A (3) of the *Construction Occupations (Licensing) Regulation 2004* provides the abovementioned exclusion for exempted work or buildings under schedule 1, part 1.3 of the Building Regulation, subject to any applicable conditions under column 4 for that part. It is envisaged that the Building Regulation's power to require a builders licence, through such a condition, will not be fettered by the *Construction Occupations (Licensing) Act 2004*, section 8, despite the latter relying on that exemption to otherwise provide to the contrary.

Regulatory Impact Statement—regulatory burden and compliance cost reductions

Nothing in the amending regulation is likely to impose appreciable costs on the community, or a part of the community, than before the amending regulation is made. Therefore, section 34 of the Legislation Act does not require that a regulatory impact statement be prepared for the amending regulation.

Much of the amending regulation either does not relate to regulatory burdens, or reduces regulatory burden, and thereby reduces compliance costs, by creating new exemptions from regulatory requirements. However, section 8 of the amending regulation codifies a requirement for certifiers to decide if relevant buildings contained loose-fill asbestos, and if so to mark building plans with an asbestos warning. Part 3 of the Building Act already requires certifiers to determine if such buildings contain asbestos and to ensure respective asbestos removal plans etc are adequate. That existing determination requirement is satisfied by asking the construction occupations registrar's delegates about records they have about such buildings. Part 3 of the Building Act also requires certifiers to mark relevant plans with a building approval, if the plans are approved by the certifiers. So, in practice, section 8 of the amending regulation will merely require the certifier to:

- ensure that the requests that they already are required to make to the registrar about asbestos, also specifically ask about loose-fill asbestos ever being in the building, or a connected building; and
- if the registrar's subsequent advice is that the registrar has records that either building had contained loose-fill asbestos, the certifier merely must mark the plans to that effect, as part of marking them with their building approval.

Recent consultation with many certifiers indicated that they did not expect that such requirements would add appreciable time or costs to the plan approval services they provide, and that the new requirement will identify the areas where certifiers need to concentrate their efforts on loose-fill asbestos premises, rather than regarding all older suburbs as potentially affected.

Considering the above, nothing in the amending regulation is likely to impose appreciable costs on the community, or a part of the community, than before the amending regulation is made, and much of the regulation will reduce regulatory burden and thereby reduce compliance costs.