

**2015**

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

**Planning and Development (Bushfire Preparedness) Amendment Regulation  
2015 (No 1)  
Subordinate law SL2015-38**

**EXPLANATORY STATEMENT**

Presented by  
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## Introduction

This explanatory statement relates to the Planning and Development (Bushfire Preparedness) Amendment Regulation 2015 (No 1) (amendment regulation) as presented to the Legislative Assembly. It has been prepared in order to assist the reader of the amendment regulation and to help inform debate on it. It does not form part of the amendment regulation and has not been endorsed by the Assembly.

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

## Purpose

The purpose of this amendment is to enable certain developments, including bushfire preparedness development works, to qualify for exemption from the requirement to prepare a development application (DA), if any required environmental authorisation and/or environmental protection agreement is held.

## Outline

DA exemptions were included in the *Planning and Development Act 2007* (the PD Act) to cut red tape and achieve a faster and simpler planning system by allowing straightforward developments to be exempt from requiring development approval. In accordance with sections 133 and 135 of the PD Act, the *Planning and Development Regulation 2008* (the Regulation) may prescribe those developments that do not require development approval.

Schedule 1 of the Regulation contains criteria which limit the scale, location, and nature of developments to ensure exemptions are only available in appropriate circumstances. Item 1.90 of the Regulation lists a range of public works developments, carried out by or on behalf of the Territory, that are DA exempt.

An exemption is only available if the development meets the description of public works and the criteria specified in the Regulation. One of these conditions, Item 1.90 (1)(a), is that an exemption is only available if an environmental authorisation or environmental protection agreement is not required under the *Environment Protection Act 1997*.

This condition operates to disqualify many public works developments, including bushfire related developments, from being exempt as they require an environmental authorisation or environmental protection agreement due to their location or type of development. Examples of this type of development include the installation and maintenance of public amenities, fire fuel reduction, construction or maintenance of a fire trail, and the maintenance of a road or car park.

The amendment regulation provides that a development may continue to qualify for exemption if the required environmental authorisation or environmental protection agreement is held. The amendment regulation switches this criterion from a disqualifying criterion to a precondition for an exemption. The requirement for an environmental

authorisation or environmental protection agreement to be held before a development qualifies for exemption ensures the protection of the environment, but without the need for the proponent to obtain development approval.

Section 133 of the PD Act (Exempt Development) which interacts with the amendment regulation by specifying the types of development that do not require development approval also specifies that exemptions are not available for developments assessable in the impact track. If, however, an Environmental Significance Opinion (section 138AB of the PD Act) is granted for a proposal, removing the proposal from the impact track, then the development may qualify for an exemption from requiring development approval.

The issue of environmental authorisations and environmental protection agreements, as well as ongoing compliance, continue to be the responsibility of the Environment Protection Authority under the *Environment Protection Act 1997*.

### **Human rights analysis**

The amendment regulation has been reviewed in relation to the *Human Rights Act 2004*.

The benefits of the amendment regulation as noted above include:

- a reduction in unnecessary regulatory burden on the Territory for select public works;
- making the development assessment process for development by the Territory more efficient; and
- maintaining an appropriate level of protection for the environment.

The amendment regulation is consistent with the ACT Government's commitment to reduce red tape and regulatory burden and consistent with the objects of the PD Act.

Generally under the PD Act, development proposals that require a DA are publically notified and the general public has a right to make representations on the DA. There is also a right to seek ACAT merit review of a decision on a DA in some circumstances. These features do not apply to development proposals that are DA exempt as there is no application to notify and no DA decision that can be subject to merit review.

The proposed amendment regulation will broaden the scope of DA exemptions with a consequent reduction in mechanisms for the community to comment on the development and seek ACAT merit review.

Third party appeal rights have been significantly modified during the first six years of the PD Act's operation to align it with the core policy objectives of increasing certainty and clarity around development processes and making the planning system faster, simpler and more effective.

The proposed law is specific, not general in its application, and only applies to defined development that satisfies the general exemption criteria, holds an environmental authorisation or environmental protection agreement (if required) and is being undertaken by the Territory. Development that triggers Schedule 4 of the PD Act, for example, would not be eligible for the proposed exemption.

It should also be noted that environmental authorisations and environmental protection agreements may include conditions, can be suspended or cancelled and involve public consultation or public notice. It is an offence to undertake an activity that would otherwise require an environmental authorisation. It is also an offence to contravene a condition of an environmental authorisation.

In all the circumstances, it is contended that the proposed law does not trespass unduly on previous rights established by the law nor does it make certain rights unduly dependent on non reviewable decisions.

It is important to note that while the change nominally extends the scope of existing exemptions, the extension will only apply to developments that would already be exempt but for the fact they require an environmental authorisation or environmental protection agreement.

The objective of the amendment regulation is an important one for the reasons noted above, that is, for removing unnecessary regulatory burden and ensuring the Territory can undertake select public works in a timely and efficient way. The objects of the amendment regulation are consistent with the objects of the PD Act and the *Environment Protection Act 1997*. The amendment is necessary and effective in meeting the stated objectives and there are no other reasonable means available for doing this.

The types of changes proposed by the amendment regulation are not considered to unduly impact on the abovementioned human rights. This is because the types of development that may be DA exempt as a result of the amendment regulation are relatively minor and works that:

- are defined and must be undertaken by the Territory
- would otherwise be DA exempt under the Regulation but for the fact that the works require an environmental authorisation; and
- must meet the general exemption criteria and any environmental authorisation and environmental protection agreement requirements.

A decision of the Environment Protection Authority to issue an environmental authorisation can include conditions, can be suspended or cancelled, is subject to public consultation and is enforceable.

In relation to section 21 human rights, it would appear that case law from related jurisdictions indicates that human rights legislation containing the equivalent of section 21 does not guarantee a right of appeal for civil matters. Opportunities for input into planning and development applications and the existence of a right to judicial review have been held in many cases to satisfy the requirement of the right to a fair trial. Case law in relation to human rights legislation containing the equivalent of section 12 suggests that any adverse impacts of a development authorised through a planning decision must be severe to constitute unlawful and arbitrary interference with a person's right to privacy.

Consistent with the above it is concluded that to the extent that the amendment regulation does impact on rights afforded by the *Human Rights Act 2004*, it is considered that these amendments meet the proportionality test of section 28 of the *Human Rights Act 2004* and are reasonable in the circumstances.

### **Revenue/cost implications**

The amendment regulation will result in both cost and time savings for the Territory, as DAs will no longer be required for developments that meet exemption criteria. Agencies will no longer be required to submit a DA, pay the accompanying fee and wait for approval for specified public works.

The amendment regulation provides greater confidence and clarity for a range of public works including bushfire preparedness developments. To the extent that DAs are no longer required for certain developments, resources will be able to be diverted to progressing other DAs.

### **Regulatory Impact Statement**

In accordance with section 36 of the *Legislation Act 2001*, a Regulatory Impact Statement (RIS) for the amendment regulation has been prepared.

### **Outline of Provisions**

#### **Clause 1 Name of regulation**

This regulation is the *Planning and Development (Bushfire Preparedness) Amendment Regulation 2015 (No 1)*.

#### **Clause 2 Commencement**

This regulation commences on the day after its notification day.

#### **Clause 3 Legislation amended**

This regulation amends the *Planning and Development Regulation 2008*.

#### **Clause 4 Schedule 1, section 1.90, amended requirement**

The amendment regulation states that a development may qualify as being exempt from development approval if it does not require an environmental authorisation or environmental protection agreement under the *Environment Protection Act 1997* or if the required environmental authorisation or environmental protection agreement is held.