

Australian Capital Territory

Construction Occupations (Licensing) Amendment Regulation 2019 (No 1)

Subordinate law SL2019–4

made under the

Construction Occupations (Licensing) Act 2004, s 129 (Regulation-making power)

EXPLANATORY STATEMENT

This explanatory statement relates to the *Construction Occupations (Licensing) Amendment Regulation 2019 (No 1)*. It has been prepared to assist the reader of the amending regulation. It does not form part of the regulation and has not been endorsed by the Assembly.

The 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. This statement provides information about the intent of the provisions in the regulation; however, it is not to be taken as providing a definitive interpretation of the meaning of a provision.

Background and overview

In response to findings of a review of the ACT's building regulatory system, the then Environment and Planning Directorate developed a pilot licence examination for applicants for builder class C licences, which included mainly questions to determine whether applicants could interpret the types of technical regulations and standards they would need to as a class C licensee. The result of the pilot indicated that many applicants did not have sufficient competency in that fundamental skill.

In 2016, following community and industry consultation, the ACT Government announced the *Improving the ACT Building Regulatory System* reform program to improve competency and standards of practice in the building industry, and increase compliance with building standards, particularly in residential buildings.

https://www.planning.act.gov.au/topics/current_projects/act_building_regulatory_system_review/improving_the_act_building_regulatory_system_review

Reform 9 in the program is to expand the written assessment prepared for the pilot for class C licensees to incorporate additional subjects, including obligations as a licensee, and create assessments for A and B class licensees. The requirements for new applicants will be implemented by a new qualifications declaration made under s 13 of the *Construction Occupations (Licensing) Regulation 2004*.

The *Building and Construction Legislation Amendment Act 2016* included amendments to enact the reforms. That Act amended the *Construction Occupations (Licensing) Act 2004* (the Act) to include a new section 24A *Eligibility for licence renewal* copied below, with a consequential amendment to section 25 (2).

24A Eligibility for licence renewal

- (1) A regulation may prescribe when an entity is eligible, or not eligible, for renewal of a licence in a construction occupation or occupation class, including the qualifications the entity must have to be eligible for renewal of the licence.

- (2) A regulation may prescribe how an applicant may, or must, demonstrate that the applicant satisfies a requirement in relation to an application for renewal.

Section 25 (2), previously provided that the Construction Occupations Registrar (Registrar) must renew a licence on application if satisfied that the applicant would be eligible to be licensed if the application were for a new licence of the same kind. It did not specifically provide for the potential differences in qualifications and experience requirements an existing licensee may not be able to meet, but is still otherwise qualified to hold the licence.

In April 2018, the Minister for Business and Regulatory Services announced the intention that the examinations for new builder licence applicants would also be applied to up to 20 per cent of existing builders at the time of licence renewal, including, but not limited to, builders with identified breaches of building legislation.

The intention is to require all licensed A, B and C class builders to undertake the examination over time to determine if they continue to have the skills and knowledge reasonably necessary to satisfactorily exercise the functions of a construction occupation or occupation class under the licence applied for.

Existing powers under the Act, s 55A allow for a skills assessment of licensees in certain circumstances. It could be argued that section 25 (2) gives the Registrar the ability to impose an eligibility assessment, such as that required for new licensees, on an existing licensee seeking a renewal. However, the power is not express. The regulation provides for the Registrar to assess a renewal applicant to be satisfied the licensee remains eligible for the licence they hold.

The regulation also amends section 13 to better align the provisions with the intention that as well as having prescribed qualifications, the entity must also satisfy the Registrar they have the required skills and knowledge, and may be required to demonstrate this in accordance with section 14. This section exists because there are times when a person who holds relevant qualifications is not suitably skilled or knowledgeable to satisfactorily exercise a licensee's functions. This may be because they were not subject to sufficiently rigorous assessment before a qualification was granted, they did not obtain the necessary skills and knowledge during their work experience, or they have not kept their skills and knowledge current.

It is not intended that:

- the Registrar need wait until a licence is due for renewal to apply a skills assessment of a licensee, or take another action, if required, or
- individuals are subject to multiple assessments on the same subject within a short period of time, or for the same reason.

It should also be noted that the skills assessment relates specifically to skills and knowledge and does not necessarily require that licensees obtain new formal qualifications as they change.

Human Rights

Human rights may be subject only to reasonable limits set by Territory laws that can be demonstrably justified in a free and democratic society. In effect, s 28 of the *Human Rights Act 2004* (HR Act) requires that any limitation or restriction of rights must pursue a legitimate objective and there must be a reasonable relationship of proportionality between the means employed and the objective sought to be realised.

Reputation

The new provisions may engage the right for a person not to have his or her reputation unlawfully attacked as expressed in s 12 (b), HR Act, particularly for a notice issued for a skills assessment of an existing licensee because the Registrar believes they may not have the skills or knowledge reasonably necessary to satisfactorily exercise their functions as a licensee.

Importance and purpose of limitation

The construction industry is regulated primarily because of the capacity of construction work to impact on the life safety, health and amenity of the public and the eventual occupants and users of buildings and other structures. Regulation of the industry is in response to the high risks associated with the work. A licensee takes on certain responsibilities in relation to licensable work, including complying with the Construction Occupations (Licensing) Act and its operational Acts, such as the Building Act where relevant.

A licensee is expected to remain eligible to hold a licence. Licenses are not issued indefinitely, but for a specific period. The renewal process is an important point for the Registrar to determine ongoing eligibility to hold a licence. Determining whether a licensee continues to have the necessary skills and knowledge is important to the integrity of the regulatory system.

Nature and extent of the limitation

The extent to which the right is limited and whether such interference is permissible depends on the context for any limitation. As noted in *R v Wholesale Travel Group Inc*:¹

The licensing concept rests on the view that those who choose to participate in regulated activities have, in doing so, placed themselves in a responsible relationship to the public generally and must accept the consequences of that responsibility.

¹ [1991] 3 SCR 154.

Therefore, it is said, those who engage in regulated activity should ... be deemed to have accepted certain terms and conditions applicable to those who act within the regulated sphere.

Participants in the construction industry have a clear understanding that this is, and has long been, a regulated industry.

The Registrar may use the relevant grounds only if the belief is formed on reasonable grounds. Further, in issuing a notice to the licensee, the Registrar is not making a public accusation or assertion about the licensee, but exercising a lawful right to determine a licensee's eligibility to continue to hold the licence. The notice does not appear on the public register required by s 107A of the Act.

Relationship between the limitation and its purpose

Carrying out licensable construction work is generally related to a business context. Licensing laws exist to prescribe minimum competency standards for the work. The provisions apply to all licensees. As noted above, in each instance the duty holder knows, or ought to know, their legal obligations and the provisions are part of a regulatory regime to limit the carrying out of certain work to only those people with appropriate skills and knowledge.

Any less restrictive means available to achieve the purpose

Applicants for new licenses may be subject to a skills assessment. The regulation extends this to applicants for a renewal. Other, less restrictive ways are not likely to achieve the required purpose. The prevalence and consequences of failing to comply with existing requirements is relatively high in the construction sector, and existing licensees should not expect a lower level of rigour in the assessment of their eligibility than those applying for a new licence.

Avoidance of arbitrary use of authority

While not mentioned in the HR Act, a rule of law is the general protection against arbitrary measures or arbitrary use of authority.

The new provisions allow the Registrar to require an assessment of any licensee's eligibility at the time of renewal. However, they do not require that the licensee has demonstrated breaches of laws, or that all licensees must be subject to the same assessment at each renewal. The law allows for random selection of licensees to undertake the assessment.

There is a wide variety of definitions of the term 'arbitrary'. The Macquarie Dictionary includes the following definitions:

1. subject to individual will or judgement; discretionary.
2. not attributable to any rule or law; accidental.
3. capricious; uncertain; unreasonable.
4. uncontrolled by law; using or abusing unlimited power; despotic; tyrannical
5. selected at random or by convention.

In considering the rule of law, legal interpretation of the term generally focus on behaviours outlined in definitions 2, 3 and 4.

The construction of the Act clearly contemplates and expects the Registrar to exercise discretion in the application of laws; for example, in determining appropriate regulatory actions and in determining licence applications. In many places the law provides that the Registrar may exercise particular functions based on his or her reasonable belief. Further, this discretion may include random selection of projects or licensees for audit or investigation. A contrary interpretation would make the regulatory system unusable and unviable. It cannot be feasibly administered without discretion or some application of random selection. Otherwise, the system would require that either all licensees or no licensee are audited, or all projects or no projects are inspected. The Registrar would be effectively disempowered by such an interpretation.

In 1989, the International Court of Justice gave an often-cited definition of the term ‘arbitrary’, stating:

Arbitrariness is not so much something opposed to a rule of law, as something opposed to the rule of law. ... It is a wilful disregard of due process of law, an act which shocks, or at least surprises, a sense of judicial propriety.²

Importance and purpose of limitation

At its most serious, a breach of construction laws can affect the lives and safety of building occupants and members of the public. Poor practice, process and incompetency have contributed to deaths of people in buildings constructed without adequate fire protection and structural soundness.

Determining whether a licensee does have the necessary skills and knowledge is important to the integrity of the regulatory system, and the safety of the public.

Nature and extent of the limitation

As noted above, the construction industry is a regulated industry. Licensees should be aware of the need to continue to be capable of exercising their functions and the possibility they will be assessed for eligibility.

In making a random selection of licensees to sit an assessment at the time of renewal, the Registrar is not disregarding due process, or acting *ultra vires*. Further, a random selection is not necessarily a capricious selection or chosen by whim, and can include a method or process for randomised selection of applicants. The law also precludes the same licensee being subject to an assessment at each renewal if they do not meet the compliance-related criteria in new section 18B (1) (a) to (d).

Relationship between the limitation and its purpose

People carrying out construction work do so in a business context. Licensing laws exist to prescribe minimum competency standards for practitioners, and to maintain an acceptable standard of construction work. The provisions apply to all licensees. In each instance the licensee knows, or ought to know, the purpose of the licensing system to limit the carrying out of certain work to only those people with appropriate skills and knowledge.

² *Electronica Siculo SpA (ELSI) (United States of America v. Italy)*, International Court of Justice, Judgment, 20 July 1989, ICJ Reports 1989, p.15.

Any less restrictive means available to achieve the purpose

As for the potential limitation to protection of reputation, applicant for new licenses may be subject to a skills assessment. The regulation extends this to applicants for a renewal. The assessment is only one of many powers the Registrar has to determine compliance with laws, but the only power to expressly determine ongoing eligibility as contemplated by the Act. Other, less restrictive ways to try to assess eligibility across all licensees are not likely to achieve the required purpose.

Regulatory Impact Statement (RIS)

Section 34 of the *Legislation Act 2001* provides that if a proposed subordinate law or disallowable instrument (the proposed law) is likely to impose appreciable costs on the community, or a part of the community, then, before the proposed law is made, the Minister administering the authorising law (the administering Minister) must arrange for a regulatory impact statement to be prepared for the proposed law.

A RIS is not required for this regulation as it is not expected to impose appreciable costs on the community or part of the community. The regulation provides greater detail on the existing powers for the Minister to declare qualifications and financial applicants, and introduces amendments to provide for assessment of ongoing eligibility for licensees as anticipated in s 25A of the Act.

This is consistent with the policy objectives of construction licensing laws, which exist to protect the public by allowing only those who are appropriately qualified to undertake licensable work. It achieves the policy objectives by allowing the Registrar to assess whether licensees understand their obligations and can competently carry out activities they will be responsible for as a licensee.

The regulation does not prescribe the form of the assessment or costs. However, it is not expected the cost of the assessment will be appreciable. The current policy for builder licence examinations will be that renewal applicants will not be necessarily charged an additional fee to undertake an assessment, as the intention is that each licensee will be assessed successive renewal periods and the cost will be recovered through general licence fees.

Scrutiny Principles

This regulation is consistent with legislative scrutiny principles.

While the Act does not include objects, the regulation is in accord with the general principles of the Act, which provide for the regulation of construction practitioners and protecting the public by determining which practitioners are eligible to hold a licence so that only suitably qualified people are licensed.

The regulation does not unduly trespass on rights previously established by law. The ability to require a skills assessment for an applicant for a new licence is established. The Act requires that a licensee who remains eligible to hold a new licence should be granted a renewal of an existing licence. However, the Act does not give a right to any licensee for an automatic renewal of their licence. It requires the Registrar to be satisfied the applicant is eligible and also provides for criteria which allow the Registrar to refuse to renew the licence. It is the role of the Registrar to determine

whether a licensee should be refused the licence they have applied for if necessary or desirable to protect the public.

The regulation does not make rights, liberties and/or obligations unduly dependent upon non-reviewable decisions. Although the decision to require a skills assessment is not a reviewable decision, the requirement is part of an existing process for a new licence or renewal. Decisions to refuse to issue a licence, impose or amend a condition on a licence, issue a licence for less than the maximum period for which the licence may be issued, or issue a licence other than the one applied for as a result of the assessment are all reviewable decisions.

The regulation does not contain that which should properly be dealt with in an Act of the Legislative Assembly. The Act covers nine broad occupation areas and it is not practicable to include eligibility requirements for all occupations and occupation classes, or administrative licensing processes, in the Act. Therefore, the Act provides for eligibility requirements to be prescribed in subordinate law.

Clause notes

Clause 1 Name of regulation

This clause provides that the name of the regulation is the *Construction Occupations (Licensing) Amendment Regulation 2019 (No 1)*.

Clause 2 Commencement

The regulation commences on the day after its notification day. There are no transitional provisions for the regulation.

Clause 3 Legislation amended

Clause 3 provides that the regulation amends the *Construction Occupations (Licensing) Regulation 2004*.

Clause 4 Section 13 heading

This clause substitutes a new heading for section 13. The current heading refers to qualifications and financial requirements. The new heading, which refers to suitability and financial requirements, reflects that a qualification may not be sufficient to be considered suitable or eligible for a licence, and responds to amendments to section 13 in clauses 5 and 6.

Clause 5 Section 13 (1), new examples

Clause 5 inserts examples of qualifications that may be declared by the Minister as necessary for an entity to be eligible for a licence. The term ‘qualification’ is not defined in the Act. Therefore, it takes the ordinary dictionary meaning. The Macquarie Dictionary provides the following definitions:

1. a quality, accomplishment, etc., which fits for some function, office, etc.
2. a required circumstance or condition for acquiring or exercising a right, holding an office, or the like.
3. the act of qualifying.
4. the state of being qualified.
5. modification, limitation, or restriction; an instance of this.

The policy intent of the Act is not that only formal academic qualifications can be required of applicants. The new examples clarify that although a qualification may include a formal academic qualification, it is not limited to such qualifications, and may include a stated period or type of experience, and that the applicant has not been refused a licence under this Act within a stated period.

An example is part of the Act, 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).

Clause 6 Section 13 (2)

This clause substitutes a new subsection (1A) and (2) for existing s 13 (2).

The substituted provisions clarify the intended operation of section 14, which allows for the Registrar to require an applicant to undertake a skills assessment to determine if they have the skills and knowledge to undertake the functions of the licensee. This is not exclusively related to the possession of a qualification – a person with a qualification may not possess the required skills and knowledge and a person without prescribed qualifications may be capable of exercising the relevant functions well.

The provisions specifically require that as well as any declared qualifications and financial requirements, an entity must have the skills and knowledge reasonably necessary to satisfactorily exercise the functions of the construction occupation or occupation class. This is consistent with the purposes of the licensing legislation – that only people capable of carrying out a licensee’s functions are licensed to undertake licensable construction work, and correspond to the provisions for skills assessments in section 14 and new section 18B (see clause 11).

Clause 7 Section 14 (1) (b) (iii)

Clause 7 omits section 14 (1) (b) (iii), which provided that the Registrar may require an applicant to undertake a skills assessment if the Registrar believes on reasonable grounds that requiring the applicant to be assessed under this section is necessary or desirable to protect the public.

The amendments in new sections 13 (1A) and (2) (clause 6), new section 14 (1) (c) and new section 18B (clause 11) place skills assessments in the context of eligibility to hold a licence. The Registrar may use a skills assessment to determine whether the applicant has the skills and knowledge reasonably necessary to satisfactorily exercise the functions of a construction occupation or occupation class under the licence applied for.

Removing this clause does not remove the Registrar’s obligations to act reasonably and in accordance with public sector conduct standards. The Registrar must also consider the necessity or desirability to protect the public in a range of decisions on a licence application.

Clause 8 New section 14 (1) (c)

This clause inserts a new paragraph applying the section to skills assessments under new section 18B (see clause 11).

Clause 9 Section 14 (2)

This clause omits the term ‘a skill’ in section 14 (2) and substitutes the term ‘the skills and knowledge’. Eligibility requirements relate to both skills and knowledge. The change is for consistency with amendments to section 13 (2), which provides that an entity is eligible to be licensed in a construction occupation or occupation class if the

entity has the skills and knowledge reasonably necessary to satisfactorily exercise the functions of that construction occupation or occupation class (see clause 6).

Clause 10 New section 14A

Clause 10 inserts a new section, which prescribes that the Registrar must give a notice to an applicant for a licence or renewal of a licence if they are required to undertake a skills assessment under section 14.

The section also includes provisions outlining when a notice must be given. In the case of a licence renewal, the notice must be given within a reasonable time, but not less than 28 days, before the licence term ends. This is intended to allow the applicant reasonable time to undertake the assessment, and for the Registrar to consider the result and make a decision on the renewal application, before the licence expires.

The Registrar does not need to wait for a person to make an application for renewal to notify them that they will be required to undertake an assessment at the next renewal.

The section also applies the existing requirements for notices for skills assessment of new applicants, to skills assessments for renewing licensees.

Clause 11 New division 4.1A

This clause inserts a new section 18B *Requirement to undertake assessment*, which provides for a range of circumstances in which the Registrar may require a licensee to undertake an assessment to determine the licensee's eligibility for renewal of the licence.

The criteria include circumstances that relate to rectification orders, grounds for occupational discipline, the Registrar's belief on reasonable grounds the licensee may not have the necessary skills and knowledge, and not providing a construction service under the licence within a prescribed period.

For grounds that the Registrar forms a belief that a ground for occupational discipline exists or the licensee may not have the necessary skills and knowledge, the belief must be formed within 12 months of expiry of the licence.

The time limits are included because it is not intended the Registrar use the renewal process exclusively to address issues that may occur during the licence period. The Registrar need not wait to a licence renewal to apply an assessment of a licensee, or take another action if required.

The Registrar can require a skills assessment at any time under the Act, section 55A if there are grounds for occupational discipline, and may undertake investigations, audits and inspections to determine a licensee's capability. If a person fails to meet their obligations it is expected that for procedural fairness and public protection, the Registrar acts expediently to address the matter.

The Registrar may otherwise require a licensee to undertake the assessment to determine the licensee's eligibility to hold the licence. Obligations, standards,

materials and practices change and it is expected that a person who gained a licence previously continue to update their skills and knowledge so they can carry out the functions of a licensee. In the building sector, there have been substantial changes to building and licensing laws. Further, the review of the building regulatory system and the results of the class C pilot examination indicate that some existing licensees may not have, or maintain, relevant skills and knowledge.

Importantly, the section does not require that the Registrar must apply a skills assessment if the Registrar considers a matter adequately addressed and includes protections against licensees being subject to multiple similar assessments as a result of regulatory action or over successive licence renewals if they have no history of compliance breaches.

Human rights implications are discussed in the **Human rights** section above.