

Regulatory Impact Statement

***Planning and Development Amendment Regulation 2008 (No 1)
Subordinate Law 2008-08***

**Prepared in accordance with the
*Legislation Act 2001, section 34***

Circulated by authority of
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This regulatory impact statement responds to four specific elements of the Planning and Development Amendment Regulation 2008 (No 1):

1. Section 10 New Division 5.1.4
s130 (e) Certain direct sales not requiring approval-Community Housing Canberra Limited
2. Section 14 New section 202
Application for extension of time to commence or complete building and development-Act s 298 (5), def A, par (b)
3. Section 14 New section 203
Extension of time to complete building and development on hardship grounds-Act, s 298B (6), def prescribed period, par (b)
4. Section 19 New section 403 - Strict Liability offence
Securing things seized under the Act, pt 12.3

Other elements of the regulation are either predominately technical amendments to clarify provisions in the initial regulation or transition existing policy. A regulatory impact statement had been prepared and tabled for the initial regulation and authorising law.

Authorising Law

Provisions in this amending regulation are authorised by the ***Planning and Development Act 2007***, sections:

- s298A (5) (b) Application for extension of time to commence or complete building and development
- s298B (6) (B) Extension of time to commence or complete building and development
- s426 Regulation-making power
- s429 Transitional regulation

Section 130 (e)

Certain direct sales not requiring approval-Act, s240 (1) (ca)

Policy Objectives

The Governments *Affordable Housing Action Plan 2007* seeks to improve access to affordable housing at all levels and specifically includes community and not-for-profit housing. There are two providers of community housing in Canberra, the housing commissioner and Community Housing Canberra Limited.

Community Housing Canberra Limited, as a Territory owned entity, responds directly to government policy intent, specifically the *Affordable Housing Action Plan 2007*. The provision provides the mechanism to facilitate this policy intent.

Achieving policy objectives

A disallowable instrument made under the Land (Planning and Environment) Act 1991 responded to the *Affordable Housing Action Plan 2007* by providing that a

direct sale could be made to Community Housing Canberra Limited. This provision transitions that disallowable instrument into regulation.

There is currently no other provider, outside of the Housing Commissioner, of community housing in Canberra and this situation is not expected to change in the foreseeable future.

Consistency with authorising law

Section 240 (1) (d) of the P&D Act 2007 provides the capacity to prescribe by regulation, where the authority may grant leases without approval of the Executive or Minister. Within the framework of the legislation, where practicable, disallowable instruments have been transitioned into regulation. This provides clear and transparent accountability on the situations where the authority may make direct sales.

The use of a regulation opposed to disallowable instrument provides rigour while remaining flexible to changing demands.

Reasonable alternative

There is no reasonable alternative as the capacity to approve direct sales to Community Housing Canberra Limited existed under the repealed Land (Planning and Environment) Act 1991. It is not the Government's intent to remove existing rights. The regulation stipulates specific organisations, such as the Housing Commissioner, or eligibility criteria for direct sales.

Although Community Housing Canberra Limited is the only other provider of community housing in Canberra should another provider express interest in entering the market then it would be appropriate and relatively simple to amend the regulation.

Assessment of Benefits and Costs

The Government promotes, through various initiatives, opportunities for providers outside of the Canberra region to enter the market. An assessment of the market has not identified any additional or potential providers of community housing. Therefore there are no appreciable costs to the community in prescribing in regulation for direct sales to Community Housing Canberra Limited.

If this situation changes then the use of regulation provides a flexible and responsive mechanism to cater for new providers.

Scrutiny Committee

The proposed provision is consistent with the scrutiny of bills and subordinate legislation committee principles. An explanatory statement is has been tabled.

General principles of the authorising law, P&D Act 2007, have been assessed by the Human Rights Commissioner and all issues responded to. Similarly the regulation has been reviewed by the Human Rights section of JACS and no issues identified.

New section 202

202 Application for extension of time to commence or complete building and development – Act, s 298 (5) def A, par (b)

Section 202 prescribes the lower figures for a fee to apply for an extension of time to commence or complete building and development.

It is 1 if a hardship reason applies to 1 or more of the lessees. The prescribed figure is 3 if:

- (a) subsection 202(1) does not apply; and
- (b) the lessee is 1 or more individuals only; and
- (c) none of the individuals has made an application under the Act section, 298A in relation to another lease within the 3 year period before the day the application is made.

Under section 202(3) **hardship reason** means:

- (a) a reason mentioned in the Act, section 298(2)(b)(ii) or (iii);
- (b) and for a lessee which is an individual – a reason mentioned in section 200 of the regulation.

Policy Objectives

Under section 298A (3) (b) an application to extend the commencement or completion of a building and development provision must be accompanied by the required fee. The required fee is worked out in accordance with the formula in section 298A(3)(b). Under section 298A(5), “A” in the formula is 5, or a lower figure, if prescribed by regulation.

The Governments *Affordable Housing Action Plan 2007* seeks to ensure that land is available and that development occurs within reasonable time to assist potential home owners to enter the market. It is not the Governments intent to unduly place additional financial burden on applicants in genuine hardship.

Achieving policy objectives

The provision responds to a key strategy of the Governments *Affordable Housing Action Plan 2007* that is ‘maintaining a planning and land release system that supports the delivery of an adequate supply of land and is responsive to changing demand’. It provides the mechanisms for individuals in hardship not to be duly affected by the impost of high fees, which would exacerbate their personal situations, while providing a higher level of deterrent for land speculation. Developers who meet the criteria will have the fee reduced to 3 times. This will ensure that developers are able to manage their financial and building obligations to deliver affordable housing opportunities to the community.

Consistency with authorising law

The provision replicates provisions in the repealed *Land (Planning and Environment Act 1991)*. The P&D Act provides that the Authority may grant leases and that building and development provisions may require commencement and completion within stated times.

Section 202 requires that a proponent apply to the Authority for consideration of an extension of time. Section 424 of the P&D Act provides that the Authority may determine fees for the Act. In accordance with ACT Treasury guidelines it was considered appropriate that a fee be charged and set at a level commensurate with the policy intent.

Reasonable alternative

There are no reasonable alternatives that would ensure the equitable access and development opportunities for individuals while ensuring, where practicable, that land is not unreasonably withheld from the market. The provision also seeks not to unduly restrict access to economic development opportunities of builders or individuals.

Assessment of Benefits and Costs

The provision lowers the costs to individuals who meet the criteria and allows a reasonable opportunity to commence and complete building and development as required as part of the lease. If the fee were not able to be reduced for hardship reasons then this would unreasonably increase the financial burden on the individual. If an individual lost the opportunity to comply with building and development provisions of their lease then this in effect would deprive them of a basic human right i.e. access to housing.

A lessee's denial of a reasonable opportunity to meet their lease provisions could increase the demand on other government support mechanisms e.g. accessing government housing or rental assistance etc.

Scrutiny Committee

The proposed provision is consistent with the scrutiny of bills and subordinate legislation committee principles. General principles of the authorising law, P&D Act 2007, have been assessed by the Human Rights Commissioner and all issues responded to. This provision ensures that through regulation the right to access housing is not unreasonably denied. An explanatory statement is has been tabled.

New section 203

203 Extension of time to complete building and development on hardship grounds-Act, s 298 (5) def A, par (b)

Section 203 is a regulation required pursuant to section 298B(6)(b) and provides that the authority may extend the maximum aggregate period of time for compliance with a building and development provision in a lease beyond the 3 year maximum by any period up to a maximum of 2 years, if hardship is established.

The authority can extend the maximum aggregate period for an individual if satisfied that the lessee:

- (1) cannot comply with the building and development provision within the required period because of:
 - (a) personal reasons; or
 - (b) financial reasons connected with the lease; or

- (c) an unforeseen major event outside the lessee's control that has a demonstrable effect on the lessee's ability to develop the land; and
- (2) has demonstrated that the lessee is reasonably likely to be able to meet the new extended time frame for compliance.

The authority can only extend the maximum aggregate period for an entity, other than an individual, if satisfied that the lessee:

- (1) cannot comply with the building and development provisions because of:
 - (a) financial reasons connected with the lease; or
 - (b) an unforeseen major event outside the lessee's control that has a demonstrable effect on the lessee's ability to develop the land; and
- (2) has demonstrated that the lessee is reasonably likely to be able to meet the new extended time frame for compliance.

Policy Objectives

The provision supports the policy objective for new section 202 in that it provides for an extension of time for individuals and corporations where generally matters outside of their control impact on their capacity to comply with building and development provisions. The provision assists individuals and corporations to remain in a situation that optimally supports the key objectives of the Governments *Affordable Housing Action Plan 2007*. In particular, by providing for an extension of time to commence and complete building and development the provision facilitates diversity in housing products and prices by ensuring that all available individuals and developers are active in the market.

Achieving policy objectives

The provision responds to genuine applications for an extension of time to commence or complete building and development and seeks to discourage land speculation. Land speculation, especially in the residential sector has the capacity to deprive potential home owners of opportunities and increases pressure on the rental market which in turn drives rental prices upwards.

The authority may approve the extension only if satisfied on reasonable grounds that the extension for the period sought would not cause an unacceptable delay to another development or land release (see section 298B(3) of the Act).

Consistency with authorising law

The provision replicates provisions in the repealed *Land (Planning and Environment Act 1991)*. The P&D Act provides that the Authority may grant leases and that building and development provisions may require commencement and completion within stated times. Leases generally include building and development provisions that require commencement within 12 months and completion within 2 years.

Reasonable alternative

There is no reasonable alternative that would achieve the policy intent while ensuring that government regulation does not contribute to further hardship arising from situations outside of an individual's control.

Assessment of Benefits and Costs

While the provision could be seen as depriving other potential home owners of the lost opportunity of entering the market a robust regime that deters land speculation will ensure an accessible supply of land for all individuals. Consequently there will be more opportunities for all members of the community to engage in building and development.

Scrutiny Committee

The proposed provision is consistent with the scrutiny of bills and subordinate legislation committee principles. General principles of the authorising law, P&D Act 2007, have been assessed by the Human Rights Commissioner and all issues responded to. This provision ensures that through regulation the right to access housing is not unreasonably denied. An explanatory statement is has been tabled.

New section 403 - Strict Liability offence ***Securing things seized under the Act, pt 12.3***

Policy Objectives

The P&D Act contains various procedures and actions that can be taken for compliance purposes. The Act includes for example a number of offences including conducting development without the required development approval or conducting development that is prohibited. Prosecution action (including in some cases infringement notices) can be taken against persons who commit these offences. To undertake and complete compliance actions it may be necessary for inspectors to seize things. The provision compliments existing provisions around compliance functions in the P&D Act.

Achieving policy objectives

It is necessary for inspectors to enter premises in order to carry out relevant compliance functions including investigating the need for compliance action. The provision provides the capacity of inspectors to seize things under the P&D Act, part 12.3.

Section 19 creates a strict liability offence. Under section 19(3), a person commits an offence if:

- (a) the person interferes with a seized thing, or anything containing a seized thing, to which access has been restricted under subsection (2); and
- (b) the person does not have an inspector's approval to interfere with the thing.

Under section 19(4) it is a strict liability offence with a maximum penalty of 10 penalty units. A penalty unit is defined in the *Legislation Act 2001* and is currently \$100.

As section 19 is a strict liability offence, it engages sections 18(1) and 22(1) of the *Human Rights Act 2004*. The government notes the following features and characteristics of the offence, which it believes justify the imposition of strict liability:

The offence is regulatory in nature, and cannot be considered “truly criminal” in the sense that it does not involve conduct that is “morally wrong” or “reprehensible” (see *International Transport Roth GmbH & Ors v Secretary of State for the Home Department* [2002] EWCA Civ 185). Also, the offence would only apply in situations where investigation by an inspector is required to determine whether a controlled activity is occurring or to determine whether an alleged offence has occurred or to determine whether an occupier has complied with an already issued compliance order (such as a rectification direction), and would not apply to members of the community at large (see *Engle v Netherlands* (1980) 1 E.H.R.R. 647). Further, the maximum penalty does not involve imprisonment and is relatively minor (10 penalty units), and is principally intended to act as a deterrent, and not be punitive or “extract retribution for wrong doing” (see *Ozturk v Germany* (1984) 6 E.H.R.R. 409).

The Government is of the view that when the totality of the above factors are considered together, the imposition of strict liability is reasonable and demonstrably justified under section 28 of the *Human Rights Act 2004*, especially when considered in light of relevant international jurisprudence concerning offences of a similar nature.

Consistency with authorising law

Section 5 of the P&D Act introduces the use of strict liability and this has been reflected in provisions of the Act such as for undertaking prohibited development – s200(5) or s203 (2) development other than in accordance with conditions. Inspector powers in the Act and regulation provides for inspectors to investigate and establish compliance. Section 19 of the amending regulation maintains the same penalty status as other similar provisions such as s362 *Contravening controlled activity orders* and s393 *Power to require name and address*.

The provision, currently in regulation due to drafting timeframes, will be transitioned to the P&D Act to provide the appropriate legislative strength and will ensure consistency with the overall compliance framework of the Act. This will be consistent with advice from Justice and Community Safety (JACS) and the Human Rights Commissioner. This regulation is a temporary measure and will be presented to the Assembly in an amendment to the Act at the first opportunity.

Reasonable alternative

Extensive liaison occurred with JACS to establish the appropriate use of strict liability in the Act and regulations. Section 19 maintains the framework of use of strict liability and is consummate with other provisions.

Assessment of Benefits and Costs

The offence is important to protect the integrity of the regulatory regime in the Act, and strict liability is necessary to ensure the offence can effectively be prosecuted by ensuring, as far as practicable, that seized things are available in the investigation of compliance. Strict liability is beneficial where offences need to be dealt with expeditiously to ensure confidence in the regulatory scheme.

Strict liability offences are an efficient and cost effective deterrent for breaches of regulatory provisions. They are appropriate where the authority is in a position to readily assess the truth of a matter and that an offence has been committed. They can be dealt with by infringement notice which is a cheaper and less time consuming alternative to a court prosecution.

Scrutiny Committee

The proposed provision is consistent with the scrutiny of bills and subordinate legislation committee principles. General principles of the authorising law, P&D Act 2007, have been assessed by the Human Rights Commissioner and all issues responded to. An explanatory statement has been tabled.

The Government notes that there is authority from the European Court of Human Rights and the Canadian Supreme Court holding that where the offence is not punishable by imprisonment considerations of “administrative efficiency” may be afforded some weight in determining whether the imposition of strict liability is justifiable (see *Re B.C. Motor Vehicle Act* [1985] 2 S.C.R. 486; and *R v The Corporation of the City of Sault Ste. Marie* [1978] 2 S.C.R. 1299,).