Regulatory Impact Statement

Planning and Development Amendment Regulation 2010 (No 1)

Subordinate Law 2010–8

Prepared in accordance with the

***Legislation Act 2001,* section 34**

Circulated by authority of

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Overview

This regulatory impact statement relates to substantive elements of the *Planning and Development Amendment Regulation 2010 (No 1)* (proposed law). The proposed law amends the *Planning and Development Regulation 2008* (the regulation). Some of the amendments are substantive, some are consequential and others are for clarification purposes.

Clauses 8 to11, 13, 19, 20 and 21, 23 to 25, 27 to 30, 32 and 33 are amendments as a consequence of other amendments made by the proposed law.

Clauses 4 to 6, 14, 16 to 18, 22, 26 and 34 clarify existing sections of the regulation.

Clauses 31, 7, and 12 and 15 make more substantive amendments to the regulation.

Clause 31

Clause 31 of the proposed law clarifies and expands an existing development approval (DA) exemption in schedule 1 of the regulation in relation to public works and also adds a new DA exemption for public art work.

The expansion of the public works exemption is the result of operational experience about those sorts of public works which are done by or for the Territory and because of their more minor nature, do not require development approval. Other amendments put the public works exemption in plainer language to make the exemption more easily accessed and understood.

Operational experience has led to the new exemption for public art work. Art work, by its nature, has proved difficult to assess within the normal planning processes and rules and criteria of the Territory Plan. As a safeguard, the new exemption has strict parameters including that the art work must be funded partly or wholly by the Territory and that the relevant Territory municipal services department has agreed to the location of the public artwork.

Clause 7

Clause 7 substitutes new sections 300 and 301 and inserts new sections 302 to 305.

It is possible to apply to the Planning and Land Authority (the authority) for a "controlled activity order" under section 350 of the *Planning and Development Act 2007* (the Act). A controlled activity order may require someone to stop unlawful development or to comply with the conditions of a development approval, to carry out demolition of an unlawful structure, etc (refer s358(3) of the Act). The authority may also make a controlled activity order on its own initiative under section 353 of the Act.

Sections 351(4) and 354 of the Act state that if the authority fails to decide an application for a controlled activity order or fails to issue an order by the end of the period prescribed by regulation, the application for a controlled activity order is deemed to be refused or the authority is taken to have decided not to make the order.

The amendments made by the proposed law ensure consistency in the time period of deemed refusal and also extend the time period from the present 20 working days. This is because operational experience has shown the 20 working days did not give the authority sufficient time to properly consider its position.

There is presently no provision in the Act or the regulation to cover the scenario where a controlled activity order is sought and the relevant activity is or becomes the subject of a development application for development approval. The authority should be able to await the outcome of such an application before making a decision on the controlled activity order. For example, if a development application is approved and the relevant activity is authorised by a development approval then there would be no reason to issue a controlled activity order because the activity was made lawful by the development approval. This becomes a little more complicated again when the outcome on a development application is delayed due to appeal. Clause 7, sections 301-302 and 304-305 cover the various scenarios.

Clause 12

Clause 12 inserts a new subsection in criterion 1 of the general exemption criteria in schedule 1.

The existing wording of the provision (s.1.11, schedule 1) meant that a proponent could not take advantage of a relevant exemption for their development if the development would be located in an easement (because the development would not comply with one of the general exemption criteria). Operational experience, however, suggested that in a lot of cases the utility provider (ACTEW) would be supportive of the development encroaching into the easement.

The amendment allows the person who has ownership or control of an easement or proposed easement, or utility infrastructure access or protection space, to agree in writing to the location of a building or part of a building in the easement (or in the utility infrastructure access or protection space). The amendment allows a proponent to access the relevant exemption if they have the consent of the owner that the development can encroach or be in the easement.

Clause 15

Clause 15 changes the general exemption criteria in section 1.14 of schedule 1 of the regulation to provide any development, other than class 10 buildings or structures (for instance, sheds, pergolas), on heritage listed property or property the subject of a heritage agreement, cannot be DA exempt.

Previously, the criteria merely stated that a development must not contravene the *Heritage Act 2004*. Operational experience relied upon building certifiers to make a determination if a development contravened the Heritage Act and this has proved problematical. Clause 15 makes it clear that any development except for minor things such as a shed, clotheslines, etc cannot be DA exempt if it is on a heritage object or place. Clause 18 of the proposed law makes it clear that maintenance of a heritage object or place is still DA exempt.

This regulatory impact statement deals with the information about the proposed law as required by section 35 of the *Legislation Act 2001* in two parts: Part 1 relates to clauses 31, 12 and 15 and Part 2 relates to clause 7.

Part 1 - Clauses 31, 12 and 15

(a) The authorising law

The provisions in this part of the proposed law are authorised by the following sections of the *Planning and Development Act 2007* (the Act):

- section 133 What is an exempt development?;
- section 135 Exempt development-no need for application or approval; and
- section 426 Regulation-making power.

(b) Policy objectives of the proposed law

The substantive changes proposed to the regulation by clause 31 of the proposed law extend reforms implemented through the planning system reform project. The main aim of the reform project was to improve timeliness, transparency and efficiency in the planning process.

One of the ways the Act achieves this aim is by allowing straightforward developments to be exempt from requiring a development approval (DA). Under the Act, section 133 and 135, the *Planning and Development Regulation 2008* may prescribe those things that do not require development approval (refer section 20 and Schedule 1). Development that does not require development approval is DA exempt development. Section 20 and Schedule 1 of the regulation exempt specified development from requiring a development approval.

The types of development prescribed in Schedule 1 include such things as single dwellings and small structures such as sheds, garages and pergolas. In the majority, the range of things prescribed in Schedule 1 has now been successfully used within the community since 31 March 2008. During this time, the authority has been monitoring the performance of the exempt development process and no significant compliance issues have been identified.

The proposed law seeks to introduce a new exemption for public art works and amends the criteria for the existing exemption for minor public works (s1.90 of Schedule 1).

Clause 31 maintains the core principles of the DA exemption framework and responds to community and industry feedback and operational experience. Further, the proposed law provides opportunities to industry as it removes the requirement for the proponent to lodge a development application with the authority.

The original regulatory impact statement (for the Act) identified the potential for a progressive loss of income as the reforms were rolled-out. Consequently, a loss of fee income to the authority, due to the reduced number of DA applications lodged for developments that are to be DA exempt, was flagged in Government decisions on these reforms.

As the proposed law enacts the policy objectives of the Act, a brief summary of the pertinent policy objectives behind the Act is provided.

Policy objectives behind the Act

One of the key policy objectives of the Government in the development of the Act was to make the planning system simpler, faster and more effective. Pages 2-3 of the Revised Explanatory Statement for the Act states that:

> "The Bill is intended to make the Australian Capital Territory's (ACT's) planning system simpler, faster and more effective. The Bill will replace the existing *Land (Planning and Environment) Act 1991* (the Land Act) and the *Planning and Land Act 2002*.
>
> The objective of the Bill is to provide a planning and land system that contributes to the orderly and sustainable development of the ACT in a way that is consistent with the social, environmental and economic aspirations of the people of the ACT, and which is in accordance with sound financial principles.
>
> The most significant change under the Bill is simplified development assessment through a track system that matches the level of assessment and process to the impact of the proposed development. As well as being simpler,

more consistent, and easier to use, this system is a move towards national leading practice in development assessment …

The Government wishes to reform the planning system to save homeowners and industry time and money and give them greater certainty about what they need to do if they require development approval. …

The new system will have less red tape and more appropriate levels of assessment, notification and appeal rights. This will make it easier to understand what does and does not need approval, what is required for a development application and how it will be assessed. …"

One of the methods for achieving a simpler, faster, more effective planning system was for the law to permit more developments to proceed without having to go through the development approval process. This approach was noted on page 3 of the Revised Explanatory Statement for the Act:

"The proposed reforms are:
* ***More developments that do not need development approval*** [emphasis added]
* Improved procedures for notification of applications and third party appeal processes that reduce uncertainty
* Clearer assessment methods for different types of development
* Simplified land uses as set out in the territory plan
* Consolidated codes that regulate development
* Clearer delineation of leases and territory plan in regulating land use and development
* Enhanced compliance powers. …"

The objective for a simpler, faster, more effective planning system is relevant to concepts of "orderly development" and "economic aspirations of the people of the ACT" which are embedded in the object of the Act (section 6):

"6 Object of Act

The object of this Act is to provide a planning and land system that contributes to the orderly and sustainable development of the ACT—

(a) consistent with the social, environmental and economic aspirations of the people of the ACT; and

(b) in accordance with sound financial principles."

The policy objectives of clauses 31, 12 and 15 of the proposed law are to further the policy objective behind the Act, that is, a planning system that is simpler, faster, and more effective. The Act has now been in operation since 31 March 2008 and through monitoring of the operation of the Act and in consultation with industry, it is evident that greater efficiencies can be achieved. The proposed law, as well as clarifying certain provisions of the regulation, introduces changes that enhance the operation of the existing DA exempt process.

The proposed law extends the things that can be DA exempt as well as clarifying an existing exemption for public works.

The proposed law is also consistent with related objectives as indicated in section 6 of the Act, that is, of a land system that contributes to "the orderly and sustainable development of the ACT consistent with the social, environmental and economic aspirations of the people of the ACT". This is because the proposed law does not remove any significant categories of development from the development application and approval system. Instead, the law extends the circumstances in which current DA exemptions can apply.

In summary, the reforms are consistent with one of the principal aims behind the authorising law, which was to create a planning and development assessment system that is simpler, faster and more effective. The exempt category offers significant savings in time, effort and costs.

(c) Achieving the policy objectives

The proposed law achieves the policy objectives by amending the *Planning and Development Regulation 2008* to:

- broaden the range of the types of things that can be built without a DA by adding public art works;
- expand and clarify the existing exemption criteria for public works
- allow development on easements to be DA exempt if the owner of the easement consents
- clarify that development on heritage listed places or objects cannot be DA exempt

These things will contribute to making the planning system faster, more effective and simpler.

(d) Consistency of the proposed law with the authorising law

The authorising law, section 133(c) of the Act (What is an exempt development?), entitles the regulation to prescribe development that is exempt from requiring development approval.

Under s133 of the Act, section 20 of the regulation (Exempt developments—Act, s 133, def exempt development, par (c)), specifies development that is DA exempt. In summary, under s20 of the regulation, schedule 1 lists exempt development. Note the development tables of the Territory Plan may also specify development that is DA exempt (refer s133) and development specified in s134 of the Act is also DA exempt.

The proposed law is within the parameters of the authorising law, section 133 of the Act. It is relevant to note that the proposed law does not create entirely new categories of DA exemptions but instead adds other exempt development types of a similar nature to that already included in Schedule 1.

As indicated above, the proposed law is also consistent with the Government objectives behind the making of the Act and the objects stated in section 6 of the Act.

(e) the proposed law is not inconsistent with the policy objectives of another territory law.

The proposed law is not inconsistent with the policy objectives of another territory law.

(f) Reasonable alternatives to the proposed law

The objective of the proposed law is to make the planning system simpler, faster and more effective through removal of unnecessary restrictions on the application of existing DA exemptions and by making a new exemption. There are no alternative means to achieve this except by amendment of the regulation.

(g) Brief assessment of benefits and costs of the proposed law

The proposed law removes unnecessary regulatory burden by broadening the circumstances in which DA exempt development can occur and ensures consistency in the application of the exempt development framework.

Further, the proposed law, by ensuring greater certainty, provides an opportunity for the authority to direct limited resources to the assessment of more complex development proposals. This has a flow-on benefit of delivering greater efficiencies in relation to those developments that require development approval thus allowing building to commence sooner and costs to be kept to a minimum.

There are no significant whole of Government budget implications in respect to this regulation. Fees paid for development approvals for public art work and public works was, in effect, an intra government transfer of funds.

There will, however, be savings in terms of government resources. Government departments such as ArtsACT will no longer need to expend funds on application fees nor use their valuable staff resources to complete DA applications. There will be less delays in getting public art work projects completed.

Public works will be able to be completed with a minimum of red tape and delay. More efficient use of government funds and resources has obvious benefits for the public in general. Also, communities that sometimes fund public art works will enjoy similar benefits to the government, that is, a reduction in fees and less delay in achieving completion of their art project.

The proposed law also represents a further implementation of the underlying principles of the planning reform as agreed upon by the community and Government[1].

(h) Brief assessment of the consistency of the proposed law with Scrutiny of Bills Committee principles

The legislative reform introduced by the Act was comprehensive and the Act and regulations formed an integral part of a single package of planning reforms. The regulation, which is to be amended by the proposed law, was developed more or less concurrently with the Act and gave effect to matters the Act allows to be prescribed by regulation.

The proposed law refines the regulation, made under the Act, without making substantive changes, except for the matter discussed below. The discussion below demonstrates that the matter is consistent with the Committee's principles.

Furthermore, general principles of the authorising law have been assessed by the Human Rights Commissioner and all issues responded to. Similarly, the regulation being amended by the proposed law has been reviewed by the Human Rights section of the ACT Department of Justice and Community Safety and no issues were identified.

The matter that needs to be addressed by this Regulatory Impact Statement in terms of consistency with the Committee's principles is the reduction in the ability to comment on proposed development.

Development in the merit and impact tracks must be publicly notified and open to public comment (see section 121 and 130 of the Act). Public notification can be either *minor* or *major*, depending on the particular development proposal.

The proposed law, by broadening the circumstances in which development may occur without development approval, will impact on the ability to comment on such

[1] For more details of the reforms see the Regulatory Impact Statement for the *Planning and Development Regulation 2008.*

development. Further, there is no public notification process for DA exempt development as it does not require development approval.

Exempt development does not have a public notification requirement because during the development of the Act and the relevant Territory Plan Codes, extensive public consultation was conducted. Therefore, the resultant rules around exempt development are designed to deliver acceptable community outcomes i.e. they do not create any material detriment. The proposed law seeks to maintain these core rules (established during the Act's development) and consultation with peak industry groups (HIA and MBA) ensure that the DA exempt framework continues to achieve a core objective, that is, provide 'black and white' criteria easily understood by the community and industry and of a nature so as to not invoke adverse community comment.

There may be discontent that more exempt development is being allowed and this could be perceived as an erosion of community opportunity to comment. However, there has been limited public complaint about DA exemptions and the types of things which are exempt, and industry (that works daily with exempt developments) has acknowledged the benefits that DA exempt development offers.

The impacts of the proposed law are minimal and justified because the range of things prescribed in Schedule 1 has now been successfully used within the community since 31 March 2008. During this time, the authority has been monitoring the performance of the exempt development process and no significant compliance issues have been identified. For instance, the Land Regulation and Audit Unit of the authority audited 57 of 803 exempt single residential dwellings that were registered for building approval and found no significant issues of concern in relation to compliance with the Territory Plan code. Further the authority, in proposing these changes, is acknowledging operational experience, responding to industry feedback, and ensuring that the DA exemption framework is consistent in its approach and application.

Part 2 - Clause 7

(a) The authorising law

The provisions in this part of the proposed law are authorised by the following sections of the Act:

- section 351 Decision on application for controlled activity order;
- section 354 Inaction after show cause action; and
- section 426 Regulation-making power.

(b) Policy objectives of the proposed law

The policy objective of clause 7 of the proposed law is to address anomalies and omissions in the regulation in relation to controlled activity orders.

It is possible to apply to the authority for a "controlled activity order" under section 350 of the Act. A controlled activity order may require someone to stop unlawful development or to comply with the conditions of a development approval, or to carry out demolition of an unlawful structure, etc (refer s358(3)).

The process for issuing a controlled activity order is as follows:

- a person (eg aggrieved neighbour) applies to the authority for a controlled activity order (s350(1));
- authority issues a "show cause notice" to the person against whom the proposed order is sought (s350(3));
- person has 10 working days to respond to show cause notice – (350(4)(b));
- authority considers the application and the response to the show cause letter, if any (s351(1)); and
- authority decides to make a controlled activity order as sought (or a different order) or not make an order (s351(2)).

If the authority fails to decide the application for a controlled activity order by the end of the period prescribed in the regulation (presently 20 working days starting from the

date of receipt of the application for the order – refer s300 of the regulation), the application for a controlled activity order is deemed to be refused (section 351(4)).

The authority may also make a controlled activity order on its own initiative. The process is much the same as an application by a person under section 350(1) except:

(1) The process starts with the authority issuing a "show cause notice" (s353(2)).

(2) section 354 of the Act states that if the authority fails to decide whether to issue a controlled activity order or not by the end of the period prescribed in the regulation (presently 20 working days starting from the day after the authority issued the show cause notice – refer s301 of the regulation), the authority is deemed to have decided to not make the controlled activity order.

One of the difficulties with these processes is that one time period applies for the authority to decide whether to issue a controlled activity order applied for by a member of the public ie 20 working days from date of application (s351(4) of the Act and s300 of the regulation) and another time period applies for the same decision when the controlled activity order is sought under the authority's own initiative ie 20 working days from date of issue of the show cause notice (s354(2) of the Act and s301 of the regulation). The time permitted for decision is effectively much shorter in the former case. This is because the 20 working day period in the former case starts on the date of receipt of the application for the controlled activity order. In the latter case, the 20 working day period starts on the date of issue of the show cause notice ie much later in the process. This inconsistency is not warranted because the nature of the decisions and the workload involved is much the same.

Another issue is that the time period of 20 working days is not long enough. The show cause notices have a 10 working day response period pursuant to section 350(4)(b) and section 353(4)(a). This means that the authority only has 10 working days of the 20 working days to make a decision. This is insufficient time to give the application proper consideration.

The current administrative process for handling an application for a controlled activity order is identified in a timeline below and identifies the specific parts of the process and the approximate time it takes for each step to be undertaken.

Working Days	**Process**
Days 1-5	Administrative processing of application by various business units in the authority
Days 6-9	Allocation and preparation of show cause notice
Days 10-12	Relevant party receives show cause notice and has the statutory time frame of 10 working days to respond to the authority
Days 13-22	Minimal investigation work undertaken until response is received from the relevant party
Day 23	Response received from relevant party
Day 24	Undertake site inspection, in accordance with part 12.3 of the Planning and Development Act 2007
Day 25-30	Finalise inspection reports and analyse evidence, commence preparation of statement of reasons
Day 31-35	Prepare and sign decision, administrative process including sending of decision to relevant parties
Day 36-37	Relevant parties receive the decision on the controlled activity order.

The current administrative process for handling an authority initiated controlled activity order is identified in the timeline below and identifies the specific parts of the process and the approximate time it takes for each step to be undertaken.

Working Days	Process
Days 1-4	Show cause notice prepared – signed by the delegate and sent to the relevant party
Days 5-7	Relevant party receives show cause notice and has 10 working days to respond to the authority in relation to the notice, giving written reasons why the controlled activity order should not be made
Day 19	Response provided by the relevant party and depending on the response, the authority commences a formal investigation
Day 20	Undertake site inspection in accordance with part 12.3 of the Planning and Development Act 2007
Days 21-22	Finalise inspection reports and analyse evidence
Days 23-26	Continue to analyse evidence and any other information collected including the response from the relevant party
Days 27-29	Make a decision on the controlled activity order including preparing a notice of decision and a statement of reasons for making the decision
Days 30-31	The delegate of the authority signs off the decision on the controlled activity order and it is posted to the relevant parties
Days 32-33	Relevant parties receive the decision on the controlled activity order.

Another issue is what happens if a controlled activity order is sought and the relevant activity is the subject of a development application for development approval. The authority should be able to await the outcome of such an application before making a decision on the controlled activity order. For example, if a development application is approved and the relevant activity is authorised by a development approval then there would be no reason to issue a controlled activity order because the activity was made lawful by the development approval. This becomes a little more complicated again when the outcome on a development application is delayed due to appeal. Clause 7, section 301-302 and 304-305 of the proposed law set out the relevant time periods to cover these scenarios.

(c) Achieving the policy objectives

The proposed law achieves the policy objectives by amending the *Planning and Development Regulation 2008* to include new sections 300 to 305.

New sections 300 and 303 extend the periods for a deemed refusal of an application for a controlled activity order and a deemed decision not to make a controlled activity order from 20 working days to 20 working days after the 10 working day period within which the lessee may give the authority written reasons.

New sections 301-2 and 304-5 cover the various scenarios where a controlled activity order is sought and the relevant activity is or becomes the subject of a development application for development approval.

(d) Consistency of the proposed law with the authorising law

Clause 7 of the proposed law is within the parameters of the authorising law.

It amends a time period that already exists in sections 300 and 301 of the regulation. It also provides a detailed analysis of when controlled activity orders are deemed to be refused or decided when a development application is made in relation the activity. This scenario was not previously covered by the regulation and this significant omission has now been corrected.

(e) the proposed law is not inconsistent with the policy objectives of another territory law.

The proposed law is not inconsistent with the policy objectives of another territory law.

(f) Reasonable alternatives to the proposed law

There were no alternative means to achieve the policy objectives in relation to controlled activity orders except by amendment of the regulation.

(g) Brief assessment of benefits and costs of the proposed law

The proposed law ensures time frames set down in the legislation are feasible and achievable which provides certainty to the public.

The additional provisions about time periods when a development application is lodged in relation to the controlled activity provide more information and ensure greater certainty about how such situations will be dealt with.

There are no significant whole of Government budget implications in respect to clause 7 of the proposed law.

(h) Brief assessment of the consistency of the proposed law with Scrutiny of Bills Committee principles

The legislative reform introduced by the Act was comprehensive and the Act and regulations formed an integral part of a single package of planning reforms. The regulation, which is to be amended by the proposed law, was developed more or less concurrently with the Act and gave effect to matters the Act allows to be prescribed by regulation.

The proposed law refines the regulation, made under the Act, without making substantive changes and is therefore consistent with the Scrutiny of Bills Committee principles.

Conclusion

This regulatory impact statement complies with the requirements for a subordinate law as set out in Part 5.2 of the *Legislation Act 2001*. An Explanatory Statement for the proposed law has been prepared for tabling.