

Regulatory Impact Statement

Construction Occupations Legislation (Exemption Assessment) Amendment Regulation 2011 (No 1)

SL2011-21

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

Circulated by authority of
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This regulatory impact statement relates to the *Construction Occupations Legislation (Exemption Assessment) Amendment Regulation 2011 (No 1)*.

Background

In 2004, the government introduced the *Construction Occupations (Licensing) Act* (COLA) which established a framework for the effective regulation of the construction industry in the ACT.

In late 2008, the ACT Planning and Land Authority (the authority) developed an action plan, ACTPLAN, to further improve service delivery and guide the authority's work into the future. As part of ACTPLAN, an industry monitoring group was established to improve communication of industry concerns and the exchange of ideas.

In 2010, in response to industry concerns, two Acts were made which put in place a set of reforms for unit titling applications and exemption assessment certifications. The first Act (*Construction Occupations Legislation Amendment Act 2010*) dealt with unit title reforms. It inserted the construction occupation of works assessor in COLA to facilitate the processing of unit titling applications. The second Act (*Construction Occupations Legislation (Exemption Assessment) Amendment Act 2010*) expanded the work of the works assessor to include the preparation of exemption assessment notices.

In recent years, the range and type of things that can be exempt from needing development approval and/or building approval has expanded and now includes such things as a single dwelling as long as it complies with the *single dwelling housing development code* in the Territory Plan.

Previously, a person could determine whether what they intend to build is BA/DA exempt by looking at the exemption criteria themselves. If what they are building needs building approval but not development approval then the building certifier will confirm the person's 'self-assessment' as part of the building approval application

process. However, for many other types of developments such as garages and carports there is not necessarily this informal 'double-check'.

The Construction Occupations Legislation (Exemption Assessment) Amendment Act (the Exemption Act) put in place a non-mandatory process for people who would like to have their 'self-assessment' confirmed by a licensed person and have a record of the decision. The reforms were delivered through both the *Building Act 2004* and the *Planning and Development Act 2007*. An exemption assessment notice under the Building Act is called an exemption assessment **B** notice and a notice issued under the Planning and Development Act is called an exemption assessment **D** notice.

Overview

The proposed law supports the abovementioned amendments to the Building Act and Planning and Development Act to introduce a new but non-mandatory service for persons to apply for and obtain an exemption assessment notice either under the Building Act (a building surveyor would be licensed to do this) or under the Planning and Development Act (both a building surveyor and a works assessor can do this). The proposed law does this by amending the *Building (General) Regulation 2008* to insert a new part 2A and the *Planning and Development Regulation 2008* to insert a new part 3.1A. It provides more details about what needs to be included in exemption assessment notices and applications for such notices including requirements for accompanying plans.

This regulatory impact statement deals with the information about the proposed law as required by section 35 of the *Legislation Act 2001*

(a) The authorising law

The provisions in the proposed law are authorised by the following sections:

- (1) the *Building Act 2004*, section 14 and 14B
- (2) the *Planning and Development Act 2007*, section 138B

(b) Policy objectives of the proposed law

The regulations that are the subject of this RIS set out a range of administrative and machinery matters which assist in providing certainty and clarity of processes and

requirements under the Building Act, and the Planning and Development Act.

The policy objectives of the proposed law are the same as those that apply to the Exemption Act. The proposed law has been developed more or less contemporaneously with the Exemption Act and gives effect to matters that the Exemption Act allows to be prescribed by regulation.

The main objectives of the Exemption Act were to:

- introduce a category of licensed people who can certify if a proposed development is exempt from the need to obtain development approval and/or building approval;
- provide a legislative mechanism for applicants to obtain formal certification of the exempt status of a proposed development; and
- provide new business opportunities for licensed people by expanding the scope of work for a building surveyor and a works assessor (both construction occupations licensed under COLA)

The Planning and Development Act (section 133) provides that certain developments can be exempt from requiring development approval (DA) provided they meet stated criteria. If a proposed development also requires building approval (BA) (under the Building Act) then a licensed building surveyor is required to determine if the proposed development required a DA before they can issue a BA. It is an offence under the Building Act, section 50B, to issue a BA for a development that required (and did not have) development approval.

Building certification under the Building Act is, and has been for some time, the province of private building surveyors licensed under COLA.

Regulations have progressively increased the range of development that does not require a DA. The expansion of the range of exempt development has increased the complexity and quantum of work undertaken by building surveyors because, in addition to Building Act matters, they must also form a view on the exempt status of proposed developments under the Planning and Development Act.

The effective operation of the new planning system is reliant, in part, on the efficient and competitive private certification regime. This previously only included building surveyors.

The Planning and Development Act previously had no provisions that require a person engaged to assess if a proposed development is exempt from requiring development approval to provide a formal certification of the assessment. The reforms introduced by the Exemption Act provide a mechanism for this formal certification. This will provide certainty and complement the building file for the lease.

The Building Act and regulation also provides that certain developments can be exempt from requiring building approval provided they meet stated criteria. However, there was no power for a building surveyor to issue a *formal* certification of the proposed development's exempt status. The building surveyor was only able to state an 'opinion' and could not issue a formal certification.

The Exemption Act provides a mechanism to provide formal certification where it is determined that a development is BA or DA exempt. This will provide certainty and complement the building file for the lease. There is also an additional mechanism for a building surveyor to formally provide written notice of the outcome for all building applications. Previously, the only outcome that could be put in writing was the issuing of the building approval. If a building approval could not be issued, no written notice could be provided.

The certification, for both development and building exemptions, will provide a level of assurance for the person/s undertaking the development in that they will have a record of the 'opinion' of the building surveyor. There will also be greater certainty and assurance for purchasers who will now have a "piece of paper" saying what they are buying was an exempt development. In addition, building surveyors will have a record of their decisions. This is important in case any legal proceedings commence in relation to the development.

The policy objective of the proposed law is to prescribe requirements in relation to exemption assessment notices so that they contain the minimum level of required

information for their intended function of providing certification that a development is DA or BA exempt.

(c) Achieving the policy objectives

The Exemption Act introduces a new - but not mandatory option - for persons to apply for an 'exemption assessment notice'. This option provides the home owner with a way of knowing their development is lawfully exempt development.

The construction occupation licensing legislation plays an important role in delivering the reforms introduced by the Exemption Act.

Amendments made to COLA by the Exemption Act make the Planning and Development Act an *operational Act* and provide the mechanism for a licensed person to be able to issue an exemption assessment notice for development under the Planning and Development Act.

Previous amendments to COLA created the new construction occupation of 'works assessor'. The Exemption Act expands the type of work available to a works assessor who can now not only do unit title assessment work but also provide an exemption assessment notice that indicates a development is exempt from needing a development approval.

The type of work a building surveyor can do is also expanded. Building surveyors can provide exemption assessment notices under the Planning and Development Act but also have a totally new capacity to issue exemption assessment notices under the Building Act.

The Building Act and the Planning and Development Act provisions relative to the application process for an exemption notice are similar in both Acts.

They cover:

- how to make an application for an exemption assessment notice (D for planning and development, and B for building) to a licensed person;
- what materials need to be provided with the application;
- how, if the licensed person accepts the application, they will manage its consideration;
- and finally how the applicant will be advised of the outcome of the application.

New section 14E of the Building Act and new sections 138B - 138G of the Planning and Development Act provide for the processes for an exemption assessment B and/or D notice. New sections 14 and 138B set out respectively the requirements of an application for an exemption assessment **B** and **D** notice including the need for the application to have a number of copies of the plans of the development. New sections 14A and s136C ensure a proponent is not forced to have an exemption assessment **B** or **D** notice when applying for building approval or development approval.

A building surveyor is already - and will continue to be - required to assess whether a proposed development is exempt when deciding an application for a building approval. However, if a proponent has obtained and supplies an exemption assessment notice D, the person making the decision must use it.

New sections 14B and 138D provide that if an application has been made to the building surveyor or a works assessor - and that person agrees to do the assessment - the building surveyor or works assessor must do the assessment and issue a notice. The notice must say what is exempt, what is not exempt and why.

A copy of the exemption assessment notice must be supplied to the planning and land authority.

New sections 14C to 14E and sections 138E to 138G set out the parameters for a building surveyor or works assessor to ask for further information. It also stipulates the form and timeframes for requesting further information and what happens if the requested information is not provided. The process is similar to that used in existing building and development approval application processes.

The policy objectives of the proposed law will be achieved through amendments to the *Building (General) Regulation 2008* and the *Planning and Development Regulation 2008*. The amendments provide additional information which the Exemption Act allows to be prescribed by regulation. The amendments prescribe the number of copies of plans to be provided with applications for an exemption assessment notice and the details to be contained in an exemption assessment notice application. They also prescribe what information is to be included in exemption assessment notices as well as the information to be shown in plans and requirements with which plans must comply.

It is reasonable and appropriate to achieve the objectives in this way as historically that is how these objectives have been achieved nationally by relevant laws in all Australian jurisdictions.

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

Given that the proposed law provides the details (for clarity and certainty purposes) that the Exemption Act allows to be prescribed by regulation, it is consistent with the authorising law.

(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 and is consistent with the policy objectives of COLA.

(f) Reasonable alternatives to the proposed law

The alternative is to maintain the BA and DA exemption process in its present form and not amend the legislation. This is not reasonable given the expressed wishes of

the community to be provided with a means of obtaining formal certification about the exempt status of a development.

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

Benefits to business and community include greater transparency and certainty. The proposed law prescribes what should be included in notices rather than leaving it to the certifier's subjective discretion. This provides greater certainty for certifiers and also the public is better able to inform itself about what a notice will provide and assess that against the cost and usefulness of an exemption notice. The proposed law also provides guidance to the public about what to include in an application for an exemption notice and to whom to apply.

Although the proposed law imposes additional regulatory burdens upon a certifier, it also provides greater business opportunities. The certifiers will now be able to charge a fee for an exemption assessment notice D which is a service certifiers were previously providing informally. This was because a certifier could not issue a BA until he had determined if a DA was needed. In other words, the certifier will now be able to charge a fee for determining if a development is DA exempt if an application is made for an exemption notice D. Similarly, the certifier will now be able to charge a fee even when there is no building approval given. Previously, no certification was required if building approval was not given and the certifier could not charge a fee even though he had provided a service.

There will also be improved business opportunities by providing a new category of work for a number of occupations. As well as building surveyors, certified practising planners, architects, engineers, building designers and landscape architects will be able to do the work of providing exemption assessment notices.

Plans will need to be provided with applications for exemption notices. The requirements for these plans are the same as those already prescribed by the building regulation and so there are no additional costs to the community in this regard. Plans can be provided electronically which is a cost saving for the community.

There is no legal requirement on the community to obtain an exemption notice and therefore, no additional costs are being imposed on the community by the proposed law. A person can still make their own assessment of whether a development is exempt or not and need not engage a certifier to provide an exemption notice.

It is not certain what fee a certifier will charge for an exemption notice. Certifiers typically charge between \$100 and \$300 per hour for their inspection services. A person who obtains a notice is required by the proposed law to send a copy of the notice to the planning and land authority. There will be a fee charged by the authority which it is anticipated will be on a cost (of filing) basis which is presently about \$16.

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

The proposed law was developed more or less concurrently with the Exemption Act and gives effect to matters the Building Act and Planning and Development Act allow to be prescribed by regulation.

The general principles of the authorising laws have been assessed by the Human Rights Commissioner and all issues responded to. Similarly, the proposed law has been reviewed by the Human Rights section of the Justice and Community Safety Directorate and no issues were identified.