

Regulatory Impact Statement

Planning and Development Amendment Regulation 2015 (No 1)

Subordinate Law SL2015-30

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

**Circulated by authority of
Mick Gentleman MLA
Minister for Planning**

Terms used

In this Regulatory Impact Statement the following terms are used:

- *Planning Act* means the *Planning and Development Act 2007*;
- *Regulation* means the *Planning and Development Regulation 2008* made under the Planning Act;
- *Amendment Regulation* means the amending regulation that is the subject of this regulatory impact statement and which amends the Regulation;
- *Heritage Act* means the *Heritage Act 2004*;
- *Council* means the ACT Heritage Council established under section 16 of the Heritage Act;
- *DA* means development approval granted under the Planning Act;
- *DA exempt* means development that is exempt from the requirement to obtain a DA under the Planning Act because the development is identified as exempt under section 20 of the Regulation made under s133(1)(c) of the Act;
- *Register* means the register of heritage places and heritage objects maintained by the Council under section 20 of the Heritage Act; and
- *Heritage property* means property that, in terms of section 8 of the Heritage Act, is:
 - a site or other area that is on the Register or covered by a heritage agreement under the Heritage Act;
 - located in a site, precinct or other area that is on the Register or covered by a heritage agreement; or
 - property that has on it a site, place or object that is on the Register or covered by a heritage agreement.

Introduction

The Regulation, Schedule 1 provides exemption for a range of minor works from the need for a DA, unless the works are at a place entered in the Register, or affected by a Heritage Agreement under the Heritage Act.

The Amendment Regulation seeks to ensure the exemptions of Schedule 1 can apply to heritage places but only if prior advice or approval is obtained from the ACT Heritage Council. This amendment then reduces the need for heritage property owners to submit a DA for works which would not require a DA if they were on a non-heritage property.

Obtaining prior Council advice is a much less onerous task than the DA process, and does not incur any fees. Therefore this amendment contributes to the ACT Government's commitment to reduce red tape and decrease regulatory burden. The amendment introduces appropriate controls to ensure continued appropriate protection and conservation of heritage significance.

This Regulatory Impact Statement (RIS) examines the options for regulatory reform through amendments to the Regulation, identifies where these amendments may result in a cost to Government, business or the community, provides a cost benefit analysis for each option likely to impose a cost, and makes a recommendation on which option will result in the greatest net benefit for the community, business and Government in regards to the recognition, protection and conservation of the ACTs heritage places and objects.

Consultation Statement

External consultation about the Amendment Regulation has occurred with the Council. The Council is supportive of the proposal.

Identifying the problem

Currently, heritage property owners are constrained by the existing requirements of Section 1.14 of Schedule 1 of the Regulation: whereby the owner of a heritage property must apply for a DA for minor works and development even if the minor works or development is DA exempt under the standard exemption provisions under s20 of the Regulation and are of no significance to the heritage values of the property.

In contrast, owners of non-heritage properties are not required to apply for a DA in such a circumstance. This means that in many cases works that are of relatively little significance for the purposes of the Heritage Act or development assessment under the Planning Act are still required to be assessed by the planning and land authority and, on referral, by the Council. This is an unnecessary cost and delay for the property owner and an unnecessary use of resources by assessment authorities. In particular, this existing regulatory framework is unnecessarily inconsistent in its treatment of heritage property owners and non-heritage property owners and for this reason is inequitable as well as inefficient.

The Amendment Regulation modifies this requirement, whilst ensuring appropriate consideration for the protection and conservation of heritage significance.

Example 1:

Under section 1.26 of Schedule 1 of the Regulation, skylights are DA exempt if:

- (a) the external area of the skylight is not more than 2m²; and
- (b) the skylight does not project more than 150mm above the surface of the roof adjacent to the skylight; and
- (c) the designated development complies with the general exemption criteria that are applicable to the development.

Currently if such a skylight is located on a heritage property, a DA is required in all cases. The requirement for a DA in such a case may not be necessary for the safeguarding of heritage significance depending on the circumstances. For example, a skylight could potentially cause heritage impacts if located in the front slope of the original roof of an identified dwelling in a heritage precinct. However, there may be no potential heritage impacts if located on the roof of an addition to the relevant dwelling if that roof was not visible from the public realm. Under the existing Regulation there is no ability to differentiate between these two situations with the result that a DA may be required for little or no reason.

Example 2:

Under section 1.30A of Schedule 1 of the Regulation, the resealing of an existing driveway is DA exempt if:

- (a) 1 or more of the following materials is used:
 - (i) concrete (including coloured or patterned concrete);
 - (ii) bitumen;
 - (iii) pavers, including bricks;
 - (iv) timber;
 - (v) grass, including stabilising treatment; and
- (b) the designated development complies with the general exemption criteria that are applicable to the development.

Resealing an existing driveway with bitumen on a heritage property in a heritage precinct is in certain circumstances potentially unlikely to impact on heritage significance. However, resealing with patterned concrete is a step that would typically be more likely to cause heritage impacts.

Again, under the existing Regulation there is no ability to differentiate between these two situations with the result that a DA may be required for little or no reason.

Objectives

The regulation amendment reduces the existing distinction between the regulation of heritage and non-heritage properties, whilst ensuring appropriate consideration for the protection and conservation of heritage significance. In summary, the Regulation Amendment is to:

- reduce an unnecessary regulatory burden on owners of heritage properties;
- make more consistent the regulatory treatment of heritage property owners and non-heritage property owners;
- make the development assessment process for heritage properties more efficient; and
- maintain an appropriate level of protection for places or objects on the Register

The Regulation Amendment is consistent with the ACT Government's commitment to reduce red tape and decrease regulatory burden.

The amendment is also consistent with the objects of the Heritage Act which include providing a system integrated with land planning and development to consider development applications having regard to the heritage significance of places and heritage guidelines. The amendment is also consistent with the functions of the Council.

The Regulation Amendment is also consistent with the objectives of the Planning Act. A key goal of the Government's reform of the planning system leading up to the introduction of the Planning Act was to enhance the timeliness, transparency and efficiency of the planning processes. One of the ways that the Act achieves this goal is by allowing straightforward developments of low significance to be exempt from requiring a DA (s 133). This recognizes that there is little value added by requiring a DA in such cases, given that typically the DA process would simply verify that the development is compliant with the relevant codes, but would not enhance the quality of the proposed development. The Act provides for the removal of the need to obtain development approval for such straightforward or minor projects, for example, for new code compliant single residences, and minor structures such as sheds, garages and pergolas etc. Such exemptions also serve to improve the efficiency of the development assessment process and the efficient use of assessment and Government resources by ensuring that only matters which have the potential to significantly impact on residential areas are open to the DA process and to ACAT merit review.

Options

The options for addressing the issues with existing Schedule 1, Section 1.14(2) are:

1. Do nothing – retain the existing Regulation as is;
2. Remove the restriction on heritage properties altogether by amending the Regulation by removing existing section 1.14(2) of Schedule 1 of the Regulation so that a development that is nominally DA exempt under the Regulation remains DA exempt even if the development is on a heritage property; or
3. Amend the Regulation to provide that a development can still be DA exempt even if it is on a heritage property provided that the Council provides advice to the planning and land authority that the development has no significant impacts on heritage significance or is of a type that is consistent with existing approvals under the Heritage Act.

Option 1 will result in the retention of the current Regulation with no changes. Currently, there are two key concerns with the operation of the current Regulation:

1. Heritage property owners will remain unfairly disadvantaged through the need to submit a DA for minor works;
2. Environment and Planning Directorate resources will continue to be unnecessarily focused towards assessing DA's for minor works which should otherwise be exempt.

Option 1 will ensure that development cannot proceed without a DA if the development is on a heritage property and in this manner the heritage significance of the property is protected. However, to the extent that there are other less burdensome options for protecting heritage significance this option represents unnecessary red tape and regulatory burden contrary to the commitment of the ACT Government to reducing red tape and unnecessary regulatory burden. Option 1 will not address this, and will continue to impose. Also this option maintains the current inequitable distinction between the regulatory position of heritage property owners and non-heritage property owners.

Option 1 does not provide an avenue to remove the current regulatory burden of the Regulation and make the Regulation more consistent. This option is not recommended.

Option 2 would assist in reducing red tape and regulatory burden. However, it may not achieve an appropriate level of protection and conservation for heritage significance.

If this option were pursued, minor works could be undertaken at heritage places, or those to which a Heritage Agreement applies, with no consideration for how the works impact on heritage significance. This could result in minor works being undertaken which negatively and irreversibly impact on heritage significance.

While this option achieves the desired intent to remove an inequitable impost for heritage property owners, it does not achieve a good outcome for the protection and conservation of heritage significance.

This option is not recommended.

Option 3: This would achieve an appropriate balance for reducing red tape and regulatory burden, while also continuing to provide an appropriate level of consideration to ensure continued protection and conservation for heritage significance.

Option 3 retains a requirement for Council advice on the impact of proposed minor works to heritage significance. Under this option development might still be DA exempt notwithstanding that it is on a heritage property. Such a development is DA exempt if the Council provides written advice to the planning and land authority that the development if carried out:

- will not diminish the heritage significance of the place or object;
- is in accordance with heritage guidelines;
- is in accordance with a conservation management plan approved by the council under section 61K; or
- is an activity described in a statement of heritage effect approved by the Council under section 61H of the Heritage Act.

As a result, if the Council provides advice that the proposed development will not diminish heritage significance or is otherwise approved under the Heritage Act as noted above then the development is DA exempt. If the Council declines to provide such advice then the development is not DA exempt because of the operation of existing section 1.14(2) of Schedule 1.

Once written advice is obtained from the Council, the proponent may then proceed with the development as they would normally for any other exempt development that does not involve a heritage registered place or Heritage Agreement.

This option still enables the Council to review proposals and ensure the protection and conservation of heritage significance, but without the need for the proponent to undertake the time and expense necessary to obtain formal development approval through the planning and land authority.

If the Council reviews a proposal for exempt works and believes there is an impact to heritage significance then the required advice will not be provided and the works cannot proceed, and may be subject to either the lodgement of a DA, on which certain conditions may be imposed, or a redesign and resubmission for the proposal.

In this way, the amendment regulation reduces regulatory burden on heritage property owners, makes the relevant regulations operate more consistently between heritage and non-heritage property owners, reduces the call on the resources of assessment authorities and maintains appropriate assessment and protection of potential development impacts on heritage properties.

Option 3 is recommended.

How preferred option 3 achieves the objectives

The effect of existing section 1.14(2) is to require a heritage property owner to lodge a DA for works that would be DA exempt if carried out on a non-heritage property.

Option 3, the preferred option, is an amendment to the Regulation to modify this requirement. The effect of the amendment is to enable standard provisions for the exemption of minor developments from the need to apply for a DA to apply to heritage properties providing that the proposed development will not affect the heritage values of the property.

The amendment regulation would mean that a development might still be DA exempt notwithstanding that it is located at a place or on an object in the Register or under a heritage agreement if the following applies. Specifically such a development would be DA exempt if the Council provides written advice to the planning and land authority that the development if carried out:

- will not diminish the heritage significance of the place or object;
- is in accordance with heritage guidelines;
- is in accordance with a conservation management plan approved by the council under section 61K; or
- is an activity described in a statement of heritage effect approved by the Council under section 61H of the Heritage Act.

If the Council provides the sought advice then the development is DA exempt. If the Council declines to provide such advice then the development is not DA exempt because of the operation of existing section 1.14(2) of Schedule 1.

In this way, the amendment regulation reduces regulatory burden on heritage property owners, makes the relevant regulations operate more consistently between heritage and non-heritage property owners, reduces the call on the resources of assessment authorities and maintains appropriate assessment and protection of potential development impacts on heritage properties.

Mutual recognition issues

A range of legislation operates at local, State/Territory and National levels throughout Australia to protect items of heritage significance.

Within each jurisdiction, heritage legislation differs as to the types of items and values protected, and the processes for assessing the impacts of works and development. Most jurisdictions have some definition of minor works, and include provisions for how these may be addressed, including through provisions which exempt certain minor works from the need to obtain formal development approval.

The ACT proposes to introduce relaxed provisions to enable minor works at heritage places to proceed with more informal approval processes.

The amendments proposed for the Regulation seek to account for the unique nature of the ACT, with regards to aspects such as the single level of Government for purposes of planning and heritage approvals, for which there is no equivalent in any other jurisdiction.

The proposed amendments to the Regulation adhere to the Australia ICOMOS Charter for places of Cultural Significance – *The Burra Charter*.

The *Burra Charter* provides guidance for the conservation and management of places of cultural significance (cultural heritage places), and is based on the collective wisdom, knowledge and experience of Australia ICOMOS members who work in conservation management. The *Burra Charter* has been widely accepted and adopted as the standard for heritage conservation practice in Australia.

Ways in which the proposed amendment to the Regulation adheres to the principles of the *Burra Charter* include the continued consideration to ensure appropriate protection and conservation of heritage significance.

Impact analysis

An impact analysis is provided below, for each of the three identified options. The analysis demonstrates the costs and benefits for the ACT Government, community and business.

Cost/Benefit Summary

ANALYSIS OF OPTIONS

Alternative options:

Benefits and constraints

| | |
|--|--|
| 1. Do nothing | 1. <u>Benefits</u> – Heritage significance is continued to be protected and conserved through formal mechanisms. <u>Constraints</u> – Heritage property owners are unfairly disadvantaged through the need to submit DA's for minor works that in reality have no impact on heritage significance – an unnecessary, time consuming and costly exercise. |
| 2. Amend Regulation so development remains DA exempt even if on a heritage | 1. <u>Benefits</u> – red tape reduction and reduced regulatory burden. <u>Constraints</u> – Potential for loss of heritage significance |

property

through no input from the Council prior to minor works being undertaken. – potential for works to negatively and irreversibly impact on heritage values.

3. Amend Regulation so development can be DA exempt even if on a heritage property if Council advises that the development will not diminish heritage significance or is consistent with Heritage Act approvals

1. **Benefits** – red tape reduction and reduced regulatory burden.

Heritage significance is continued to be protected and conserved through formal mechanisms.

While this nominally extends the scope of existing DA exemptions, the extension will only apply to development that would already be DA exempt but for the fact that the development is on a heritage property and heritage significance is protected through the role of the Council.

Constraints – This measure will amount to an extension of the scope of DA exemption provisions with a consequent reduction in mechanisms for community comment on the development. This is because development that is DA exempt is not subject to public notification and is not subject to third party ACAT merit review.

COST BENEFIT ANALYSIS OF OPTION 3 (recommended option)

| Sector | Costs | Benefits |
|------------|--|---|
| Government | <ul style="list-style-type: none"> • potential for some community concern in relation to adjacent neighbours no longer having opportunity to comment on DAs for minor works on Heritage properties. • There will be a minor reduction in revenue, through decreased DA fees. | <ul style="list-style-type: none"> • Improved streamlining of the development approvals process. • Some relatively minor reduction in the use of development assessment resources as a result of the conditional extension of DA exemptions to heritage properties. |
| Business | <ul style="list-style-type: none"> • Nil identified. | <ul style="list-style-type: none"> • Greater clarity and certainty for exempt works at heritage places. • Reduced timeframes for obtaining Heritage Council advice for minor works due to the fact that advice can be obtained without having to go through the DA assessment process |

| Sector | Costs | Benefits |
|-----------|--|---|
| Community | <ul style="list-style-type: none"> • Adjacent neighbours will no longer receive opportunity to provide comment on proposed minor works at heritage places. • Works on heritage properties that are DA exempt will now not be subject to third party ACAT merit review. While this nominally extends the scope of existing DA exemptions, the extension will only apply to development that would already be DA exempt but for the fact that the development is on a heritage property and heritage significance is protected through the proposed role of the Council. | <ul style="list-style-type: none"> • Individual heritage property owners will no longer need to submit a DA for minor works. This will save them time and money, and will provide increased certainty. |

SUMMARY

The proposed Regulation Amendment will meet ACT Government commitments to reduce red tape and decrease regulatory burden by lessening the need for heritage property owners to submit a formal DA for minor works that would otherwise be considered exempt. The need for Council approval prior to minor works being undertaken at a heritage registered place, or place subject to a Heritage Agreement, will continue to ensure appropriate consideration to protect and conserve heritage significance.

Conclusion and recommended option

EPD proposes to make amendments to the Regulation to better streamline, create efficiencies, reduce red tape and decrease regulatory burden. The recommended approach to enable this will result in a net benefit to Government, the community and business.

Guidelines for implementation and review

The regulatory controls will be implemented through an amendment to the Regulation. There will be opportunity to review the amendment after 12 – 18 months, to assess its operation and ability to meet the stated objectives.