REGULATORY IMPACT STATEMENT

Planning and Development (Bushfire Preparedness) Amendment Regulation 2015 (No 1)

Subordinate Law SL2015-38

Environment and Planning Directorate

November 2015

Authorised by the ACT Parliamentary Counsel—also accessible at www.legislation.act.gov.au

Contents

Terms Used 3

Executive Summary 4

Consultation Statement 4

Defining the issue 4

Objective 5

Options 6

How preferred option 2 achieves the objectives 7

Impact analysis 8

Consistency of the proposed law with the authorising law 10

Transitional arrangements 10

Mutual Recognition 10

Brief assessment of the consistency of the proposed law with Scrutiny of Bills Committee principles 10

Summary 12

Conclusion and recommended option 12

Guidelines for implementation and review 12

Strategy to implement the preferred option 12

Authorised by the ACT Parliamentary Counsel—also accessible at www.legislation.act.gov.au

Terms Used

In this regulatory impact statement the following terms are used:

ACAT	The Australian Capital Territory Civil and Administrative Tribunal
Amendment Regulation	The amending regulation that is the subject of this regulatory impact statement and which amends the Regulation
DA exempt	Development that is exempt from the requirement to obtain development approval under the Planning and Development Act
Environment (Note – this definition is taken directly from the Planning and Development Act)	Each of the following is part of the environment: (a) the soil, atmosphere, water and other parts of the earth; (b) organic and inorganic matter; (c) living organisms; (d) structures, and areas, that are manufactured or modified; (e) ecosystems and parts of ecosystems, including people and communities; (f) qualities and characteristics of areas that contribute to their biological diversity, ecological integrity, scientific value, heritage value and amenity; (g) interactions and interdependencies within and between the things mentioned in paragraphs (a) to (f); social, aesthetic, cultural and economic characteristics that affect, or are affected by, the things mentioned in paragraphs (a) to (f).
Environmental Authorisation	An Environmental Authorisation and/or Environmental Protection Agreement as may be required by the EP Act
EPA	The Environment Protection Authority, as established under division 2.1 of the EP Act
EP Act	*Environment Protection Act 1997*
EPD	The Environment and Planning Directorate
Planning and Development Act	*Planning and Development Act 2007*
Regulation	*Planning and Development Regulation 2008*
RIS	This regulatory impact statement
TAMS	The Territory and Municipal Services Directorate

Authorised by the ACT Parliamentary Counsel—also accessible at www.legislation.act.gov.au

Executive Summary

This Amendment Regulation will reduce unnecessary regulatory burden, without compromising appropriate regulatory capture, and facilitate more efficient statutory clearance for some public works developments.

The ACT regularly undertakes a range of public works developments to improve, maintain and upgrade its assets, as well as undertaking development to prepare the city for bushfire events.

The Regulation (schedule 1, section 1.90 Public Works) provides an exemption from the need to obtain development approval for a range of developments undertaken by the ACT provided they satisfy certain criteria. One of these criteria is not requiring an Environmental Authorisation under the EP Act.

Many prescribed public works developments, including bushfire related developments, do not qualify for an exemption because, contrary to the mandatory criterion, they require an Environmental Authorisation. The Amendment Regulation proposes to switch this element from a disqualifying criterion to a precondition for an exemption. This could result in more public works developments, including the maintenance of municipal infrastructure and landscapes, and bushfire related developments, being exempt from the requirement to obtain development approval.

Additionally, this Amendment Regulation will help government respond to the recommendations of the performance audit report by the ACT Auditor-General's Office into Bushfire Preparedness (Report No. 5/2013). It will also assist the ACT to improve, maintain and upgrade public works items.

While the changes discussed in this RIS relate to the facilitation of smaller scale developments, the reduction of regulatory burden on prescribed projects will potentially free up resources for work on delivering major projects in the ACT Strategic Bushfire Management Plan and improving, maintaining and upgrading important Territory assets.

Consultation Statement

EPD has conducted discussions with EPA and TAMS. Both EPA and TAMS have provided in principle support for the proposed Amending Regulation. It is noted that the Amending Regulation relates solely to works undertaken by or on behalf of the Territory.

Defining the issue

Background

The ACT planning system is a track based system. Developments are assessed in the track appropriate for the complexity and potential impact they may pose on the environment. Tracks include impact, merit and code. There is also provision for specific developments to be exempt from the requirement to obtain development approval when certain criteria are met.

Item 1.90 of Schedule 1 of the Regulation lists and defines a range of public works developments carried out by or on behalf of the Territory that are potentially exempt from the requirement to obtain development approval.

Public works development includes:

- construction of public amenities;
- installation or maintenance of street and park furniture;
- the maintenance of stormwater drainage or flood mitigation measures;
- bushland regeneration, landscaping, gardening, tree planting, tree removal and fire fuel reduction, construction or maintenance of fire trails; and
- maintenance of a road or car park.

This exemption is only possible if the development fits within the parameters of the described works and if certain criteria are met. One of the criteria the development must meet is not requiring an Environmental Authorisation (Section 1.90 (1)(a)).

This requirement disqualifies many public works developments from being exempt as many require an Environmental Authorisation due to their location, or type of development. This includes, but is not limited to, day to day activities undertaken by the ACT such as the maintenance of a road or car park, bushfire preparedness related development such as fire fuel reduction, and the construction or maintenance of a fire trail. These developments contribute to the safe and efficient operation of the ACT.

The Amendment Regulation is intended to provide a clearer, less burdensome pathway through the planning process for public works. This will assist the ACT to carry out a range of important and regular developments including, for example, preparing for future bushfire events.

Examples of development undertaken frequently by the ACT that are not DA exempt

- The installation or maintenance of street and park furniture, as it requires an Environmental Authorisation. Under current arrangements, this development would not qualify for an exemption for the requirement to obtain development approval.
- The construction or maintenance of a footpath, bicycle path, bicycle parking facility, walking track or other pedestrian requires an Environmental Authorisation.
- Development such as bushland regulation, landscaping, gardening, tree planting, tree maintenance, tree removal or fire fuel reduction would also require an Environmental Authorisation.

In the circumstances, it would appear that development undertaken on a regular basis by the ACT such as maintaining footpaths and public roads, would not meet the exemption criteria and would therefore require development approval. The breadth of exclusion appears unintentional, and makes the system impracticable.

Objective

The Regulation Amendment reduces the regulatory burden on defined public works undertaken by the ACT, whilst ensuring appropriate consideration for the protection of the environment remains in place. In summary, the Regulation Amendment is to:

- reduce unnecessary regulatory burden in connection with the development and implementation of public works;
- make the development assessment process for public works more efficient; and

- maintain an appropriate level of protection for areas of environmental significance or sensitivity through existing legislative provisions, for example through environmental significance opinions and Environmental Authorisations.

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

The Regulation Amendment is also consistent with the objectives of the Planning and Development Act. A key goal of the Government's reform of the planning system leading up to the introduction of the Planning and Development Act was to enhance the timeliness, transparency and efficiency of the planning processes.

One of the ways the Planning and Development Act achieves this goal is by allowing relatively straightforward developments to be exempt from the requirement to obtain development approval. This recognises that there is little value added by requiring a development application in such cases, given that typically the development application process would simply verify that the development is compliant with the relevant codes, but would not enhance the quality of the proposed development.

The Planning and Development 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 certain public works. 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 result in relevant impacts are open to the development application process and to ACAT merit review.

It is expected the Amendment Regulation will permit public works, including bushfire management, to be put in place more quickly, efficiently and to be maintained more effectively.

The Amendment Regulation leaves in place the assessment against the requirements of the Territory Plan for developments that do not meet the exemption criteria or public works definition.

Importantly, the provision in the Planning and Development Act (section 133 (2)(b)) that disqualifies development in the impact track from being exempt is unchanged by the Amendment Regulation.

Options

1. Do nothing – retain the existing Regulation

This would result in the retention of the current Regulation with no changes. There are three key concerns with the operation of the current Regulation:

- The current arrangements unnecessarily disqualify a multitude of public work developments including bushfire preparedness developments that would otherwise be exempt if they did not require an Environmental Authorisation.
- TAMS resourcing would continue to be unnecessarily focussed on preparing documentation for development applications for public work developments which could otherwise be DA exempt. This reduces their ability to carry out works in an efficient and responsive manner.
- EPD resourcing would continue to be unnecessarily focused on administering and assessing development applications for public works which should otherwise be exempt.

This option would mean that development could not proceed without a development application if the development required an Environmental Authorisation. However, relevant protections would already be in place through the Environmental Authorisation, meaning the additional step of a development application would lead to duplication and unnecessary regulatory burden (cost and time).

This option would also be contrary to the ACT Government's goal to reduce unnecessary red tape and regulatory burden.

Option 1 is not recommended.

2. Amend the Regulation to provide that a development can be exempt if it holds any Environmental Authorisation required under the EP Act.

This option would achieve an appropriate balance between reducing red tape and regulatory burden, while also continuing to provide an appropriate level of consideration to ensure continued protection of the environment.

Under this option a development might still be exempt from the requirement to obtain development approval even if it requires an Environmental Authorisation. Such a development would be exempt if all other criteria were met and the EPA granted an Environmental Authorisation.

Once the Environmental Authorisation was obtained from the EPA, the proponent could then proceed with the development as they would normally for any other exempt development that met the general exemption criteria.

This option still enables proposals triggering the EP Act to be reviewed and ensures the protection of the environment, but without the need for the proponent to obtain development approval.

If the EPA reviewed an application and believed conditions were appropriate they would be imposed as part of the Environmental Authorisation.

The proposed Amendment Regulation option reduces regulatory burden on the ACT and potentially results in less impact on existing resources while maintaining appropriate assessment and protection of potential development impacts on the environment.

This option would result in a highly efficient and quick regulatory process, without compromising the key competing interests of human safety and environmental protection.

Option 2 is recommended.

How preferred option 2 achieves the objectives

Option 2 would make the process for developing and implementing public works of certain types (such as bushland regeneration, landscaping, gardening, tree planting, tree maintenance, and tree removal or fire fuel reduction) more flexible and quicker. This could lead to a reduction in cost burden and enable quicker responses to recognised areas of need.

Impact analysis

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

Cost/Benefit Summary

ANALYSIS OF OPTIONS

Options:	Benefits and constraints
1. Do nothing	1. Benefits – the environment continues to be protected through formal mechanisms including retaining the development assessment process for relevant developments including public notification processes and in some cases third party ACAT merit review rights. Constraints – requiring development approval for defined public works development imposes an additional layer of regulation, and may potentially hinder the ability of the ACT to undertake simple and sometimes critical public works (for example bushfire preparedness). This is an unnecessary, time consuming and costly exercise.
2. Amend the Regulation to provide that a development can still be exempt if it holds any Environmental Authorisation required under the EP Act.	Benefits – red tape reduction and reduced regulatory burden. The proposed change removes the need for the ACT to seek development approval for prescribed public works and removes the related costs and timeframes arising from the development application process. Relevant environmental values will continue to be protected through existing and well used processes (such as environmental significance opinions and Environmental Authorisations). While the change nominally extends the scope of existing exemptions, the extension will only apply to developments that would already be exempt but for the fact they require an Environmental Authorisation. Constraints – this measure will amount to an extension of the scope of exemptions with a consequent reduction in mechanisms for community comment on the development. This is because development that is exempt is not subject to public notification and is not subject to third party ACAT merit review. It is important to note this will only extend to those developments that meet the public works definition and the general exemption criteria in the Regulation.

Authorised by the ACT Parliamentary Counsel—also accessible at www.legislation.act.gov.au

COST BENEFIT ANALYSIS OF OPTION 2 (recommended option)

Sector	**Costs**	**Benefits**
Government	• potential for community concern in relation to no longer having an opportunity to comment on development applications through the public notification process. However, this cost is mitigated by limiting the Amendment Regulation to only apply to defined public works developments that are undertaken by the ACT and meet the general exemption criteria. The development must also meet all requirements of the Environmental Authorisation. • There will be a minor reduction in revenue, through decreased development application fees.	• Improved streamlining of the development assessment process. • Reduction in the resources required to prepare DA documentation • Reduction in the use of development assessment resources as a result of the extension of exemptions to prescribed public works.
Business	• Nil identified.	• Reduced regulatory burden will allow the ACT to reallocate resources that may be used to improve the safety of the community and facilities in it.
Community	• Community will no longer receive an opportunity to provide comment on proposed development applications. • Public works that are exempt will now not be subject to third party ACAT merit review. While this nominally extends the scope of existing exemptions, the extension will only apply to development that would already be exempt but for the fact that the development requires an Environmental Authorisation or Environmental Protection Agreement.	• Reduced regulatory burden will allow the ACT to reallocate resources that may be used to improve the safety of the community and facilities in it.

Authorised by the ACT Parliamentary Counsel—also accessible at www.legislation.act.gov.au

Sector	Costs	Benefits
	However, this cost is mitigated by limiting the Amendment Regulation to only apply to defined public works developments that are undertaken by the ACT and meet the general exemption criteria. The development must also meet all requirements of the Environmental Authorisation.	

Consistency of the proposed law with the authorising law

Section 133(1)(c) of the Planning and Development Act states that exempt development means development that is exempt from requiring development approval under a regulation.

The Amendment Regulation is within the parameters of the authorising law. There is currently a multitude of developments that are exempt from requiring development approval. The number and breadth of developments that are exempt has broadened since the planning system was reformed in 2007. The proposed law is also consistent with the objects of the Planning and Development Act.

It is important to note the proposed law does not create an entirely new category of exempt development, but modifies the qualifying criteria. The proposed law is not inconsistent with the policy objectives of other ACT law.

Transitional arrangements

The proposed regulation does not have retrospective effect. No transitional arrangements are necessary.

Mutual Recognition

There are no mutual recognition issues as the Planning and Development Act operates as a standalone piece of planning legislation with each State and Territory managing planning under its own legislation. There are no opportunities for mutual recognition as there are for example for building licenses.

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

The Committee's terms of reference require it to consider whether (among other things) any instrument of a legislative nature made under an Act which is subject to disallowance and/or disapproval by the Assembly (including a regulation, rule or by-law):

- is in accord with the general objects of the Act under which it is made;
- unduly trespasses on rights previously established by law;
- makes rights, liberties and/or obligations unduly dependent upon non reviewable decisions; or

Authorised by the ACT Parliamentary Counsel—also accessible at www.legislation.act.gov.au

- contains a matter which in the opinion of the Committee should properly be dealt with in an Act of the Legislative Assembly.

The proposed law could potentially be considered to trespass on rights previously established by law as it removes an existing opportunity to comment on a development application and a right to review. The issue is whether it does so unduly.
In addition, by removing existing review rights, the proposed law makes certain rights dependent on decisions that are non-reviewable. Again, the issue is whether it does so unduly.

The Planning and Development legislation modified third-party appeal rights, so that in general terms, only development applications having significant off site impacts, particularly in residential areas, would be open to third-party appeals. Third-party appeal rights have been significantly modified during the first six years of the Planning and Development Act's operation to align it with the core policy objectives of increasing certainty and clarity around development processes and making the planning system faster, simpler and more effective.

The proposed law is specific, not general in its application, and only applies to defined development that satisfies the general exemption criteria, holds an Environmental Authorisation (if required) and is being undertaken by the Territory. Development that triggers Schedule 4, for example, would not be eligible for the proposed exemption.

It should also be noted that Environmental Authorisations may include conditions, can be suspended or cancelled and involve public consultation. It is an offence to undertake an activity that would otherwise require an Environmental Authorisation. It is also an offence to contravene a condition of an Environmental Authorisation.

In all the circumstances, it is contended that the proposed law does not trespass unduly on previous rights established by the law nor does it make certain rights unduly dependent on non reviewable decisions.

There remains the question of whether the proposed law contains matters that should properly be dealt with in an Act (as opposed to a regulation). The Planning and Development Act and Regulation currently list a range of developments that are development application exempt when certain criteria are met.

Section 133(1)(c) of the Planning and Development Act states that exempt development means development that is exempt from requiring development approval under a regulation. Schedule 1 of the Regulation outlines those developments which are exempt from the requirement for development approval. This means the proposed law is within an express power granted by the Legislative Assembly and in line with its intended purpose of focussing development assessment on matters of greater impact (both onsite and offsite). The Legislative Assembly has also had an opportunity to consider several regulations made under this provision on previous occasions.

In summary the proposed law does not unduly trespass on existing rights, or, make rights unduly dependent upon non reviewable decisions and is an appropriate matter for regulation.

Authorised by the ACT Parliamentary Counsel—also accessible at www.legislation.act.gov.au

Summary

The proposed Regulation Amendment will meet ACT Government commitments to reduce red tape and decrease regulatory burden by lessening the need for the ACT to submit a formal development application for prescribed public works that would otherwise be considered exempt. The continued requirement to hold an Environmental Authorisation will ensure appropriate consideration is given to protecting and conserving the environment. The community will no longer receive the opportunity to provide comment on these developments. Developments that are exempt will not be subject to third party merit review.

Conclusion and recommended option

Bushfire events have the potential for severe health, social, economic and environmental impacts. It is important that developments are undertaken to maintain and upgrade the municipal landscape and prepare the territory for bushfire events. Improved regulatory responses can assist ACT agencies to undertake these developments.

The Amendment Regulation allows prescribed public works developments to qualify for exemption if they hold the required Environmental Authorisation and creates a streamlined, efficient process with reduced regulatory burden.

The community will no longer receive the opportunity to provide comment on these developments and the developments will not be subject to third party merit review. However the development will still be subject to checks and regulatory requirements in the form of EP Act process and some processes under the Planning and Development Act, such as environmental significance opinions. The recommended approach will result in a net benefit to Government and the community.

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.

Strategy to implement the preferred option

TAMS currently undertake a range of developments, some being exempt, others requiring development approval. The changes resulting from the preferred option will be communicated by EPD to TAMS, EPA and the Emergency Services Agency through established communication channels. This will ensure the change and resulting planning framework is well understood.