

2010

LEGISLATIVE ASSEMBLY FOR THE  
AUSTRALIAN CAPITAL TERRITORY

**Construction Occupations Legislation  
(Exemption Assessment) Amendment Bill 2010**

EXPLANATORY STATEMENT

**Presented by  
Mr Andrew Barr MLA  
Minister for Planning**

This Explanatory Statement relates to the Construction Occupations Legislation Amendment Bill 2010 (the amending Bill).

## Overview

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. This Bill is a practical response to one of the few remaining issues that industry has raised.

The amending Bill is the second of two Bills that seek to introduce a set of reforms for unit title applications and exemption assessment certifications. The first Bill which was made in March 2010 dealt with unit title reforms. It inserted the construction occupation of works assessor in COLA. The amending Bill seeks to expand that definition to include doing the work necessary to do an exemption assessment notice.

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.

At the moment, a person can determine for themselves whether what they intend to build meets exemption criteria. 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 reforms proposed by the amending Bill 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. This record is then available for a variety of future uses. For instance, a prospective buyer would have 'peace of mind' that the exempt single dwelling they are looking at buying is an exempt development or that the double garage is exempt development.

### The main objectives of the amending Bill are 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
- provide new business opportunities to licensed people.

The reforms will be 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 will be called an *exemption assessment D* notice.

For some proposed developments, such as a garage, a proponent may seek both an exemption assessment **B** and **D** notice while for most single dwellings an exemption assessment **D** notice could be obtained.

The amending Bill amends the Building Act, COLA (and its associated regulation), the Planning and Development Act and the *Unit Titles Act 2001*. COLA is amended to expand what a works assessor can do to include the work proposed by the Bill. The Building Act and Planning and Development Act are amended to provide the framework for an applicant to ask whether or not work is exempt from requiring building approval and development approval respectively. The Unit Title Act is amended so that a plan prepared by a registered surveyor must show those things prescribed by regulation.

## **Part 1 Preliminary**

### **Clause 1 Name of Act**

States that the name of the Act is the *Construction Occupations Legislation Amendment Act 2010*.

### **Clause 2 Commencement**

States the commencement provisions for the Act. Part 1 and part 2, which are the naming and commencement provisions automatically commence on the notification day (see Legislation Act, s 75 (1)).

The remainder of the Act is commenced in stages. Part 4 – Construction Occupations (Licensing) Regulation (other than section 42) and Part 6 – Unit Title Act, commence on commencement of the *Construction Occupations Legislation Amendment Act 2010*, pt 3 (Unit Titles Act 2001). This is because these parts are specific to unit title reforms.

The remaining parts commence on a date fixed by the Minister. This means that the amendments proposed to the Building Act and Planning and Development Act will not commence until the Minister fixes a day in writing (see Legislation Act, s 77 (1)). These Parts are dependant on supporting regulations that are being developed and can not work without those regulations. Therefore, it is appropriate that the parts commence when the proposed regulations commence.

Because of the complexity of the regulations and the need to consult with industry and community, section 79 of the Legislation Act will not apply. This is because the 6 month period provided for by s79 may be insufficient to complete the regulations.

A provision of the Act will commence automatically after 1 year if it is not already commenced.

## **Part 2 Building Act 2004**

### **Clause 3 Legislation amended—pt 2**

States that the part amends the Building Act 2004. The provisions that are included in this Part are all those amendments necessary to the Building Act to deliver the proposed reforms.

### **Clause 4 New part 2A**

Clause 4 inserts a new Part 2A Exemption assessments. This Part includes those provisions that set out the parameters for an exemption assessment B notice. An exemption assessment B notice is a notice issued under the Building Act. The provision provide what information must be provided in the application and what happens if requested information is not provided. These are the core provisions for exemption assessment B notices.

### **New section 13 Purpose of exemption assessment B notices**

New section 13 sets out the purpose of exemption assessment B notices. An exemption assessment may relate to building work that is to be done or has been done. For work that is to be done, an exemption assessment B notice will certify if the work is, or is not, exempt from all or part of the Building Act. For work that has been done, an exemption assessment B notice will certify whether the work is, or is not, exempt from all or part of the Building Act based on whether the work was exempt at the time it was done, or is currently exempt.

### **New section 14 Exemption assessment applications**

New section 14 sets out the requirements of an application for an exemption assessment B notice including the need for the application to have a number of copies of the plan of the proposed development. An application can only be made to a building surveyor. The regulations may also prescribe other things that may be included in the application and what information must be shown in the plans.

### **14A Exemption assessment not required for building approval**

New section 14A provides that an exemption assessment is not a requirement of the building approval process and gives a building surveyor the power to issue an exemption assessment B notice. A person may still personally decide whether building work is exempt and not apply for an exemption assessment from a building surveyor. A building surveyor may issue an exemption assessment B notice to the owner of a parcel of land only if the owner has applied to the building surveyor for an exemption assessment. A building surveyor must not refuse to issue a building approval on the ground that the applicant for the approval has not applied for an exemption assessment B notice.

### **14B Exemption assessments and notices**

If the owner of a parcel of land *applies* for an exemption assessment under section 14 and the building surveyor *agrees* to provide the assessment, the building surveyor *must* undertake the assessment and issue a notice (an exemption assessment B notice) stating what building work is exempt or not exempt from the Building Act and anything else prescribed by regulation.

The building surveyor must also give the exemption assessment B notice to the owner and within 5 days of issuing the notice, give a copy to the construction occupations registrar.

If the building work that is the subject of the application has been completed and the building surveyor certifies that the building work is exempt because the building work was exempt when built, the exemption assessment B notice must also include the dates on which the building surveyor has based the assessment that the building work was exempt.

If, after taking reasonable steps, the owner cannot find a building surveyor who will agree to provide an exemption assessment, the owner may apply to the construction occupations registrar to appoint a building surveyor to undertake the exemption assessment and issue an exemption assessment B notice to the owner.

#### **14C Exemption assessment applications—request for further information**

New section 14C sets out the rules for a building surveyor to request further information for an exemption assessment notice B from an owner. The request must be in writing, the building surveyor must believe on reasonable grounds that the further information will help in the preparation of the assessment. The building surveyor can not ask for information if the surveyor and the owner has agreed that the surveyor will obtain the further information.

A building surveyor is not entitled to require someone other than the owner to take photographs and is not entitled to further information if the surveyor has reasonable access to suitable information that allows the surveyor to decide the application without personally inspecting the land where the building work is to be carried out.

#### **14D Exemption assessment applications—contents of request for further information**

New section 14D sets out the contents of request for further information. A request under section 14C must—

- (a) state the period within which the further information asked for must be provided; and
- (b) if the further information is not a document—state that the further information must be provided in writing; and
- (c) state that the owner need not provide the further information, but if the owner fails to provide some or all of the information in accordance with the request, the building surveyor may refuse under section 14E to issue an exemption assessment B notice; and
- (d) state that, despite the owner and building surveyor having previously not agreed that the building surveyor would obtain the further information, the owner and building surveyor may agree that the building surveyor will obtain the information.

The request may require the owner to confirm all or part of any information provided by statutory declaration.

The period within which information must be provided must be at least 20 working days or, if a shorter period is prescribed by regulation, the shorter period. The

building surveyor may, on application before the end of the 20 working day period extend the period within which the further information must be provided once only, for a period not longer than 20 working days.

**14E Exemption assessment applications—effect of failure to provide further information**

The building surveyor may refuse to issue an exemption assessment B notice under section 14C if a building surveyor has asked for further information and the owner has not provided some or all of the information by the stated period or any extended period, and the owner and the building surveyor have not agreed that the building surveyor will obtain the further information.

**Clause 5 Application of pt 3 to building work, Section 15, new note**

Inserts new note in section 15 to alert the reader to the existence of new part 2A inserted by clause 4 above.

**Clause 6 Building approval applications, Section 26 (2), note**

Substitutes the section 26(2) Note with new subsections (e) and (f) and two new notes. Section 26 (2) sets out what must be included in applications for building approval. Clause 6 inserts new subsections (e) and (f) which require applications to include, if obtained, a copy of any development approval relating to the building work and an exemptions assessment D notice.

New Note 1 refers to Exemption assessment D notices in the Planning and Development Act, s 138D which is inserted by this amending Bill (refer clause 46 below).

**Clause 7 Section 26A (3)(b).** The amendment corrects an omission of words in the existing provision and ensures that the provision is consistent with similar provisions in the P&D Act and Unit Title Act.

**Clause 8 Contents of request for further information, Section 26B (4), note**

Omits the note from section 26B(4) to provide consistency in the Act in relation to time periods for providing further information.

**Clause 9 New section 27A**

Inserts new section 27A. Existing provisions in the Building Act require the building surveyor to issue building approval for those applications that they determine or assess as requiring building approval. However, there is no provision that requires the building surveyor to provide anything in writing if they determine that no building approval is required. This leaves the applicant with no written evidence of this determination. New section 27A rectifies this situation.

If an application for a building approval is made to the certifier under section 26 and the certifier does not issue the building approval for all or part of the building work that is the subject of the application because the certifier—

- (i) refuses to issue approval under section 26C; or
- (ii) must not consider the application under section 27; or
- (iii) must not issue the approval under section 30 or section 30A; or

- (iii) decides that the approval is not required for all or part of the building work for which the application is made, the certifier must give the applicant written notice stating that building approval is not issued and the reason why the approval is not issued.

**Clause 10 Issue of building approvals, Section 28 (2) (a), new note**

Inserts new note in section 28 (2)(a) to draw the certifier's attention to the fact that taking all reasonable steps to get the information the certifier needs includes deciding whether the building work requires development approval.

**Clause 11 Approval requirements, New section 29 (1) (g) (ia)**

Existing section 29(1) states the things that a building certifier must consider when determining a building approval application. Section 29(1) requires the building certifier to determine if the proposed works are exempt and if not, a development approval needs to be attached to the application. New section 29(1)(g)(ia) provides that the building certifier must also consider an exemption assessment D notice if it is attached to the application. The Notes provide further information as follows:

“Note 1: If site work is an exempt development, it does not require development approval (see *Planning and Development Act 2007*, s 133).

Note 2: Applying for an exemption assessment is not a requirement of the development approval or building approval process. A person may personally decide whether a development is an exempt development and not apply for an exemption assessment from a works assessor or building surveyor (see *Planning and Development Act 2007*, div 7.2.6A).”

**Clause 12 Section 29 (1) (g), new example and note**

Inserts a new example and note in section 29(1)(g) as follows:

“If an exemption assessment D notice for the proposed residence and garage indicates the residence and garage are exempt from requiring development approval, then the plans do not need to include any additional information to establish that the proposed residence and garage are an exempt development.”

This provision does not give a certifier power to require an applicant to provide either development approval, or an exemption assessment D notice, under the *Planning and Development Act 2007*.”

**Clause 13 New section 29 (6A)**

Consistent with building and development approvals, a lifespan has been placed on the use of an exemption assessment D notice. New section 29(6A) provides that the certifier must be satisfied that the exemption assessment D notice attached under subsection (1)(g)(ia) is for the site work to which the application relates and was issued by a works assessor or building surveyor not more than 3 months before the day the application for building approval was made.

The Note explains that there is no obligation on the certifier to confirm the exemption assessment D notice in any other way, such as for accuracy or completeness.

**Clause 14 Contents of request for further information, Section 32B (4), note**  
Omits the note to section 32B (4) to provide consistency in the Act in relation to time periods for providing further information.

**Clause 15 Notification by certifier of possible noncompliant site work, New section 50A (2A) and (2B)**

Inserts new section 50A (2A) and (2B). The intent of section 50A is to require certifiers to share with the planning and land authority suspicion(s) that the certifier reasonably forms about possible non-compliant site work so that the authority can investigate the matter. New subsection 50A (2A) allows a certifier to rely on an exemption assessment D notice issued not more than 3 months earlier in considering whether development approval is needed for the site work. New subsection (2B) states that subsection (2A) applies whether or not the exemption assessment D notice was incorrect if the certifier was not aware, and could not reasonably have been aware, that the notice was incorrect.

**Clause 16 Site work without adequate development approval—people, New section 50B(3A) and (3B)**

Clause 16 inserts new section 50B (3A) and (3B). Section 50B makes it an offence for a certifier to issue a building approval or approve amended plans if that site work or plans require development approval and there is no such approval. Section 50B (3) sets out defences to a prosecution for the offence. One defence includes that the defendant was satisfied on reasonable grounds that the development did not need approval. New section 50B(3A) states that a defendant is taken to be satisfied on reasonable grounds if the defendant proves that the defendant relied on an exemption assessment D notice, issued not more than 3 months before the day the building approval was issued. New subsection (3B) states that subsection (3A) applies whether or not the exemption assessment D notice was incorrect, unless the prosecution establishes that the defendant knew, or could reasonably be expected to have known, that the notice was incorrect.

**Clause 17 Site work without adequate development approval—partners, Section 50C**

Omit the words “the partnership proves” and substitutes the words “a partner proves”. This is a technical amendment to correct terminology.

**Clause 18 New section 50C (3A) and (3B)**

Inserts new section 50C (3A) and (3B) in similar terms to clause 16 except it is for partnerships.

**Clause 19 Carrying out building work in contravention of s 42, Section 51 (4)**

Substitutes a new section 51(4) in section 51 which includes new subparagraphs (b) and (c) which provide that it is a defence to a prosecution against the owner of the parcel of land for an offence of doing building work except in compliance with section 42 (Requirements for carrying out building work) if the owner satisfies the court that they did the work because they had an exemption assessment B notice which they were not aware was incorrect or had an approval which they were not aware should not have been issued.



### **Clause 20 Section 51 (5) (b)**

Clause 20, in effect, omits the word “that” from section 51(5)(b). This is a technical amendment to remove a superfluous word.

### **Clause 21 New section 51 (6)**

Inserts new section 51(6) that provides a defence to a prosecution against a person other than the owner in similar terms to new section 51(4)(b) and (c) inserted by clause 20 above.

### **Clause 22 Regulation-making power, Section 152 (6)**

Substitutes a new section 152(6) that provides the regulations may prescribe maximum penalties of not more than 60 penalty units rather than 10 penalty units for offences against the regulations. The increase is required because the contraventions that have historically resided in the Act can now be prescribed in the regulation. Therefore it is reasonable to also provide that the same penalty unit maximum be available for contraventions against the regulation. This will ensure a consistent compliance regime between operational Acts and COLA.

### **Clause 23 New part 15**

Inserts a new part 15 in the Building Act that provides for transitional matters.

The name of new part 15 is **Transitional- Construction Occupations Legislation Amendment Act 2010 (No.2)**.

The use of transitional provisions such as these is appropriate as the Act seeks to introduce a new license category, area of work and service for the community. The provisions provide a quick and efficient means of dealing with unintended consequences or operational matters during the initial implementation phase. For this reason the provisions are only temporary, lasting 2 years from commencement, and any modifications to the Act done using these provisions need to be done through the normal Act amendment process otherwise they will expire. During the normal Act amendment process the ACT Legislative Assembly will consider the proposed amendments and if appropriate agree to the Act being permanently amended.

The part includes new sections 200 -202.

### **Section 200 Meaning of *commencement day* – pt 15**

Provides that ***commencement day*** in this part means the day the part commences. Part 15 is included in Part 2 of the amending Bill which commences on a day fixed by the Minister by written notice (see clause 2 above, subsection (3))

### **Section 201 Transitional regulations**

Part 15 provides a regulation making power to quickly correct or cover a matter that may have been inadvertently left out or needs amending or correcting. Section 201 (1) provides that a regulation may prescribe transitional matters necessary or convenient to be prescribed because of the enactment of the *Construction Occupations Legislation Amendment Act 2010 (No.2)* Section 201 (2) provides that a regulation may modify this part (including in relation to another territory law) to make provision in relation to anything that, in the Executive’s opinion, is not, or is not

adequately or appropriately, dealt with in this part. A regulation under subsection (2) has effect despite anything elsewhere in the Building Act or another territory law and expires 2 years after the day it commences.

**Section 202 Expiry—pt 15** provides that the part expires 2 years after the commencement day. In effect this means that any Act modifications done under this provision will expiry in 2 years unless they are made permanent through the normal legislative processes.

**Clause 24 Dictionary, note 2**

Inserts “construction occupations registrar” in note 2 of the Dictionary because Clause 4 of this amending Bill includes a reference to the registrar.

**Clause 25 Dictionary, new definitions**

Inserts the following definitions in the Dictionary because of the amendments to the Building Act by this amending Bill:

**building surveyor**—see the *Constructions Occupations (Licensing) Act 2004*, section 9.

**exemption assessment**—see section 14.

**exemption assessment B notice**—see section 14B.

**exemption assessment D notice**—see the *Planning and Development Act 2007*, section 138D.

**Part 3 Construction Occupations (Licensing) Act 2004**

**Clause 26 Legislation amended—pt 3**

States that this part amends the *Construction Occupations (Licensing) Act 2004*.

**Clause 27 What is a building surveyor? New section 9(1)(aa)**

Inserts new section 9(1)(aa) that states that a building surveyor is an entity that provides an exemption assessment service. This enables a building surveyor to undertake this type of work as well as building certification work (under s9(1)(a)) and works assessment service (under s9(1)(b)).

**Clause 28 New section 9(1A)**

Inserts new section 9(1A) that provides a definition of **exemption assessment service**. An **exemption assessment service** is the doing of exemption assessment work.

**Clause 29 Section 9(3), new definition of exemption assessment work**

Inserts new definition of **exemption assessment work** which means undertaking an exemption assessment under the *Building Act 2004*.

**Clause 30 What is a works assessor? Section 14A (3), definition of works assessment work, except note**

Substitutes a new definition of **works assessment work** so that the existing definition also includes undertaking an exemption assessment under the *Planning*

and *Development Act 2007* or providing as well as doing anything incidental to providing, a unit title assessment report under the *Unit Titles Act 2001*.

**Clause 31 What is an operational Act? Section 16**

Inserts *Planning and Development Act 2007* in the list of operational Acts in section 16. There is a range of legislation that is linked to COLA and contains requirements in relation to licensees. These **operational Acts** are presently specified in section 16 of the Act

**Clause 32 Rectification orders—exercise of registrar’s powers, Section 33A (b)**

As a consequence of the amendment of section 16 by clause 32 above, omits the words “this Act, an operational Act or the *Planning and Development Act 2007*” and substitutes the words “this Act or an operational Act”.

**Clause 33 Considerations for deciding under s 34 and s 35, Section 36 (3) (b)**

As a consequence of the amendment of section 16 by clause 31 above, omits the words “this Act, an operational Act or the *Planning and Development Act 2007*” and substitutes the words “this Act or an operational Act”.

**Clause 34 Registrar’s functions, New section 104(3)**

Inserts a new section 104(3) that provides that a code of practice is a notifiable instrument. Section 104 gives the registrar power to develop and maintain codes of practice but does not presently stipulate how these codes are made available publicly. Clause 34 corrects this omission.

**Clause 35 New part 16**

Inserts new part 16 in the *Construction Occupations Legislation Amendment Act 2004* (COLA) that provides for transitional matters.

**The name of new part 16 is Part 16 Transitional—Construction Occupations Legislation Amendment Act 2010 and Construction Occupations Legislation Amendment Act 2010 (No 2)**

Part 16 includes new sections 158 to 160.

**158 Meaning of commencement day—pt 16**

Provides that **commencement day** in this part means the day this part commences. Part 3 commences on a day fixed by the Minister by written notice (see clause 2 above subsection (3))

**159 Transitional regulations**

Part 16 provides a regulation making power to quickly correct or cover a matter that may have been inadvertently left out or needs amending or correcting. Section 159 (1) provides that a regulation may prescribe transitional matters necessary or convenient to be prescribed because of the enactment of the *Construction Occupations Legislation Amendment Act 2010* and the *Construction Occupations Legislation Amendment Act 2010 (No.2)*. Section 159(2) provides that a regulation may modify this part (including in relation to another territory law) to make provision in relation to anything that, in the Executive’s opinion, is not, or is not adequately or appropriately, dealt with in this part. A regulation under subsection (2) has effect

despite anything elsewhere in COLA or another territory law and expires 2 years after the day it commences.

#### **160 Expiry—pt 16**

States that this part expires 2 years after the commencement day.

### ***Part 4 Construction Occupations (Licensing) Regulation 2004***

#### **Clause 36 Licence applications – Act, s17 (3) Section 5(h)**

Substitutes new section 5 (h) to include the works assessor.

#### **Clause 37 and 38 Term of licence for asbestos assessors, building surveyors and plumbing plan certifiers – Act, s24 section 8(1)**

Amends the heading so that a works assessor is included and substitutes new section 8 (1) so that the provisions of section 8 also apply to a works assessor.

#### **Clause 39 particulars in register Section 9 (1) (c)**

Substitutes new paragraph (c) in section 9(1) to include the works assessor.

#### **Clause 40 New section 18A**

Inserts new section 18A which states that an applicant for a works assessor licence is eligible for the licence only if the applicant is adequately insured. New section 18A(2) defines when an applicant is adequately insured. An applicant must have professional indemnity insurance that meets the parameters of paragraphs (a) to (d)

#### **Clause 41 Schedule 1, new part 1.9**

Inserts new part 1.9 Works Assessors in schedule 1. Schedule 1 provides for classes of construction occupation licence and functions. Part 1.9 under clause 41 provides for the class of works assessor - unit titles that can do works assessment work.

#### **Clause 42 Schedule 1, new part 1.9**

Substitutes new part 1.9. Clause 41 commences with the *Construction occupations Legislation Amendment Act 2010*, part 3 (Unit Titles Act 2001) and clause 42 commences on a day fixed by the Minister by written notice (see Clause 2 of this amending Bill). Therefore, clause 41 applies until the other provisions of the amending Bill commence at which point a new part 1.9 will be substituted by operation of clause 42. Part 1.9 under clause 42 provides for the classes of works assessor – planning and development and unit titles.

A planning and development works assessor is divided into two classes: class A and class B and can undertake exemption assessment work under the Planning and Development Act. A class A works assessor will be able to work within the full scope of P&D exemptions while a class B works assessor will only be able to work within class 1 or class 10 or associated with a class 1 or class 10. This is because the qualification requirements are higher for a class A works assessor than a class B. A works assessor will also be able to undertake all unit title assessor work under the Unit Titles Act.

### ***Part 5 Planning and Development Act 2007***

### **Clause 43 Legislation amended—pt 5**

States that this part amends the *Planning and Development Act 2007*.

### **Clause 44 What is an exempt development? Section 133, new note**

Inserts a new note in s133 that states a person may apply for an exemption assessment under s 138B to work out whether a development is an exempt development. It is not mandatory to apply for an exemption assessment notice, if the development meets the prescribed exemption criteria the development is exempt from the need to apply for development approval. The exempt status is not dependant on having an exemption assessment notice.

### **Clause 45 Consideration of development proposals Section 138 (4)(a), new note.**

A new note is inserted at section 138 to alert a proponent that they could, if they choose, seek an exemption assessment D notice under new section 138B. It is not mandatory to apply for an exemption assessment D notice and a notice does not substitute for an *advice* provided under section 138 (4)(a).

An exemption assessment D notice and an *advice* under s138 deliver two different outcomes.

### **Clause 46 New division 7.3.1A**

Inserts new division 7.3.1A. This division has similar provisions to that for the Building Act set out above in clause 4 but apply to the Planning and Development Act instead.

#### **Division 7.3.1A Exemption assessments, 138A Purpose of exemption assessment D notices**

New section 138A sets out the purpose of exemption assessment D notices. An exemption assessment may relate to development that is to be undertaken or has been undertaken. For development that is to be undertaken, an exemption assessment D notice will certify if the development is, or is not, an exempt development. For development that has been undertaken, an exemption assessment D notice will certify whether the development is, or is not, exempt from requiring development approval at the time it was done, or is currently exempt.

#### **138B Exemption assessment applications**

New section 138B sets out the requirements of an application for an exemption assessment D notice. An application may be made to a works assessor or building surveyor. Applying for an exemption assessment is not a requirement of the development approval or building approval process (see s 138C below). A person may personally decide whether a development is an exempt development and not apply for an exemption assessment from a works assessor or building surveyor.

- (2) The application must—
- (a) include—
  - (i) the number of copies of the plans relating to the development work prescribed by regulation; and
  - (ii) any other details or material prescribed by regulation; and

- (b) be in writing signed by the applicant; and
- (c) if the applicant is someone other than the lessee of the land to which the application relates—also be signed by—
  - (i) if the land to which the application relates is subject to a lease—the lessee of the land; or
  - (ii) if the land to which the application relates is public land or unleased land—the custodian for the land; or
  - (iii) in any other case—the planning and land authority.

If a form is approved under s 425 for an application, the form must be used.

A regulation may prescribe information required to be shown in plans under subsection (2) (a) (i).

### **138C Exemption assessment not required for development approval**

New section 138C provides that an exemption assessment is not a requirement of the development approval process. A works assessor or building surveyor may issue an exemption assessment D notice to an applicant only if the applicant has applied to the works assessor or building surveyor for an exemption assessment.

### **138D Exemption assessments and notices**

If a person applies to a works assessor or building surveyor for an exemption assessment under section 138B and the works assessor or building surveyor agrees to provide the exemption assessment, the works assessor or building surveyor must—

- (a) prepare the exemption assessment; and
- (b) issue a notice (an exemption assessment D notice) stating whether the development is an exempt development under section 133; and
- (c) give the exemption assessment D notice to the applicant; and
- (d) within 5 days after the day the works assessor or building surveyor issues the notice—give a copy of the notice to the planning and land authority.

The works assessor or building surveyor may refuse to issue a notice if the works assessor or building surveyor does not have enough information (see s 138G below).

If the development that is the subject of the application has been undertaken and the works assessor or building surveyor certifies that the development is exempt because the development was exempt when undertaken, the exemption assessment D notice must also include the dates on which the works assessor or building surveyor has based the assessment that the development was exempt.

If, after taking reasonable steps, an applicant cannot find a works assessor or building surveyor who will agree to provide an exemption assessment, the applicant may apply to the construction occupations registrar to appoint a works assessor to prepare the exemption assessment and issue an exemption assessment D notice.

The new section also includes a note to alert the proponent that an *advice* under section 138 may be sought. It is not mandatory to seek an advice under s138 and it does not substitute for an exemption assessment D notice. An *advice* and an exemption assessment D notice deliver two different outcomes.

### **138E Exemption assessment applications—request for further information**

New section 138E sets out the rules for a works assessor building surveyor to request further information for an exemption assessment notice D from an applicant. The request must be in writing, the works assessor or building surveyor must believe on reasonable grounds that the further information will help in the preparation of the assessment and the works assessor or surveyor and the applicant cannot have agreed that the works assessor or surveyor will obtain the further information.

### **138F Exemption assessment applications—contents of request for further information**

New section 138F sets out the contents of a request for further information. A request under section 138EF must—

- (a) state the period within which the further information asked for must be provided; and
- (b) if the further information is not a document—state that the further information must be provided in writing; and
- (c) state that the applicant need not provide the further information, but if the applicant fails to provide some or all of the information in accordance with the request, the works assessor or building surveyor may under section 138G refuse to issue an exemption assessment D notice; and
- (d) state that, despite the applicant and works assessor or building surveyor having previously not agreed that the works assessor or building surveyor would obtain the further information, the applicant and works assessor or building surveyor may agree that the works assessor or building surveyor will obtain the information.

The request may require the applicant to verify all or part of any information provided by statutory declaration.

The period within which information must be provided must be at least 20 working days or, if a shorter period is prescribed by regulation, the shorter period. The works assessor or building surveyor may, on application before the end of the 20 working day period extend the period within which the further information must be provided once only, for a period not longer than 20 working days.

### **138G Exemption assessment applications—effect of failure to provide further information**

The works assessor or building surveyor may refuse to issue an exemption assessment D notice under section 138E if a works assessor or building surveyor has asked for further information and the applicant has not provided some or all of the information by the stated period or any extended period, and the applicant and the works assessor or building surveyor have not agreed that the works assessor or building surveyor will obtain the further information.

### **Clause 47 Offence to develop without approval, Section 199 (6)**

Substitutes new section 199(6).

Section 199 creates an offence to develop with development approval and a defence for the offence. The proposed new sub-section (6) substitutes existing sub-section 6

so that the same defences, against sub-section 4, are extended to those persons who use an exemption assessment notice.

However there is no defence to the absolute offence of doing prohibited development. Having an exemption assessment D notice does not change this. Section 200 of the Act would still apply.

The proposed provision also provides a defence if the person had a building approval for the works. The Building Act provides that a building approval can not be issued if the development requires development approval.

Section 199 (6) sets out defences to a prosecution for the offence. One defence includes that the defendant was satisfied on reasonable grounds that the development did not need approval. New section 199 (6) (b) states that a defendant is taken to be satisfied on reasonable grounds if the defendant proves that the defendant relied on an exemption assessment D notice, issued not more than 3 months before the day the building approval was issued.

- (6) It is a defence to a prosecution for an offence against subsection (4) if the defendant proves—
- (a) that before undertaking the development the defendant took reasonable steps to find out whether the development required development approval; or
  - (b) that—
    - (i) an exemption assessment D notice was issued before, but not more than 3 months before, the day the defendant started to undertake the development, stating that the development was an exempt development under section 133; and
    - (ii) the defendant was not aware, and could not reasonably have been aware, that the notice was incorrect; or
  - (c) that—
    - (i) before the day the defendant started to undertake the development, a building approval or approval of amended building work plans under the Building Act 2004 for which development approval was required was issued; and
    - (ii) the building work was carried out when the building approval, or the approval for the amended plans, was in force; and
    - (iii) the defendant was not aware, and could not reasonably have been aware, that the building approval, or the approval of the amended plans, should not have been issued without development approval.

See the Building Act 2004, s 28 (for issue of building approvals) and s 32 (for amendment of approved plans).

#### **Clause 48 Regulation-making power, Section 426 (5)**

Substitutes a new section 426 (5) that provides the regulations may prescribe maximum penalties of not more than 60 penalty units rather than 10 penalty units for offences against the regulations. The increase is required because the contraventions that have historically resided in the Act can now be prescribed in the



regulation. Therefore it is reasonable to also provide that the same penalty unit maximum be available for contraventions against the regulation. This will ensure a consistent compliance regime between the operational Acts and COLA.

#### **Clause 49 new chapter 16**

Inserts new chapter 16 in the *Planning and Development Act 2007* that provides for transitional matters.

#### **The name of new chapter 16 is Chapter 16 Transitional—Construction Occupations Legislation Amendment Act 2010 (No 2)**

Chapter 16 includes new sections 468 to 470.

#### **468 Meaning of commencement day—pt 16**

Provides that **commencement day** in this part means the day this part commences. Part 5 commences on a day fixed by the Minister by written notice (see clause 2, above subsection (3))

The use of transitional provisions such as these is appropriate as the Act seeks to introduce a new license category, area of work and service for the community. The provisions provide a quick and efficient means of dealing with unintended consequences or operational matters during the initial implementation phase. For this reason the provisions are only temporary, lasting 2 years from commencement, and any modifications to the Act done using these provisions need to be done through the normal Act amendment process otherwise they will expire. During the normal Act amendment process the ACT Legislative Assembly will consider the proposed amendments and if appropriate agree to the Act being permanently amended.

#### **469 Transitional regulations**

Chapter 16 provides a regulation making power to quickly correct or cover a matter that may have been inadvertently left out or needs amending or correcting. Section 469(1) provides that a regulation may prescribe transitional matters necessary or convenient to be prescribed because of the enactment of the *Construction Occupations Legislation Amendment Act 2010 (No.2)*.

Section 469(2) provides that a regulation may modify this part (including in relation to another territory law) to make provision in relation to anything that, in the Executive's opinion, is not, or is not adequately or appropriately, dealt with in this part. A regulation under subsection (2) has effect despite anything elsewhere in the Planning and Development Act or another territory law and expires 2 years after the day it commences.

#### **470 Expiry—ch 16**

States that this part expires 2 years after the commencement day.

#### **Clause 50 Dictionary, new definitions**

Inserts new definitions in the Dictionary

**exemption assessment**—see section 138B.

**exemption assessment D notice**—see section 138D.

**works assessor**—see the *Constructions Occupations (Licensing) Act 2004*, section 14A.

## **Part 6 Unit Titles Act 2001**

### **Clause 51 Legislation amended—pt 6**

States that this part amends the *Unit Titles Act 2001*.

### **Clause 52 Unit title applications—general requirements, New section 17 (5) (c)**

Before the note, inserts new section 17(5)( c) that provides:

- (c) a plan prepared by a registered surveyor showing anything prescribed by regulation.

This amendment is additional to amendments made through the Construction Occupations Legislation Amendment Act 2010 (COLA – Part 1) that put in place a new construction occupation of works assessor who could do unit title assessment report. Industry indicated that they required an alternate process for progressing a unit title application. The concept of a unit title assessment report responds to industry needs. The report is a collation, compiled by the works assessor, of a number of documents and a statement that the physical development matches both the approved DA and the unit title plan which is prepared by a registered surveyor.

The proposed amendment by requiring a unit title plan to show all things prescribed by regulation will ensure that the plan is meaningful for the application process. Previously the plan may have been completed too far away from completion and was no longer reflective of the physical development once a unit title application was made.

### **Clause 53 Unit title assessment reports, Section 22B (2), example**

Substitutes the existing examples to now also include that information about a development approval can be prescribed by the regulation to be included in the application.

### **Clause 54 Unit title assessment report applications – unit title assessor may require further information, new section 22C (3) and (4).**

The amendments inserts new sections 22C (3) and 22C (4). New section 14C sets out the rules for a building surveyor to request further information for an exemption assessment notice B from an owner. Existing 22C provides for how the works assessor can ask for further information. The new section provides that the building surveyor can not ask for information if the surveyor and the owner has agreed that the surveyor will obtain the further information.

A building surveyor is not entitled to require someone other than the owner to take photographs and is not entitled to further information if the surveyor has reasonable access to suitable information that allows the surveyor to decide the application without personally inspecting the land where the building work is to be carried out.

This provision ensures that a request for further information under the Unit Titles Act is consistent with a request for further information in relation to exemption assessment notices under the Building Act and P&D Act.