

Environmental Planning and Assessment Amendment (Quality of Construction) Bill 2003

Explanatory note

This explanatory note relates to this Bill as introduced into Parliament.

Overview of Bill

The objects of this Bill are:

(a) to amend the *Environmental Planning and Assessment Act 1979* and the *Environmental Planning and Assessment Regulation 2000* with respect to the following matters:

- (i) functions of certifying authorities,
- (ii) investigation of certifying authorities,
- (iii) improper influence with respect to the conduct of certifying authorities,
- (iv) the appointment and functions of principal contractors,
- (v) construction certificates,
- (vi) occupation certificates,
- (vii) conditions of development consents and complying development certificates,
- (viii) time for giving notices,
- (ix) offences and penalties,
- (x) other miscellaneous matters,
- (xi) savings and transitional provisions,

and to make a consequential amendment to the *Environmental Planning and Assessment (Savings and Transitional) Regulation 1998*, and

(b) to amend the *Building Legislation Amendment (Quality of Construction) Act 2002* to remove certain uncommenced amendments from that Act that will be re-enacted with modifications in the proposed Act.

Outline of provisions

Clause 1 specifies the name (also called the short title) of the proposed Act.

Clause 2 provides for the commencement of the proposed Act on a day or days to be appointed by proclamation, except for sections 3 and 5 and Schedule 1 [27], [32], [39] and [42]–[44] to that Act which will commence on the date of assent to the proposed Act.

Clause 3 is a formal provision giving effect to the Schedule of amendments to the *Environmental Planning and Assessment Act 1979* (**Schedule 1**).

Clause 4 is a formal provision giving effect to the Schedule of amendments to the *Environmental Planning and Assessment Regulation 2000* and the *Environmental Planning and Assessment (Savings and Transitional) Regulation 1998* (**Schedule 2**).

Clause 5 repeals certain uncommenced amendments in the *Building Legislation Amendment (Quality of Construction) Act 2002* as referred to in the Overview above.

Schedule 1 Amendment of Environmental Planning and Assessment Act 1979

The various amendments to the *Environmental Planning and Assessment Act 1979* (**the 1979 EP&A Act**) in Schedule 1 to the proposed Act are explained below. To assist locating related amendments to the *Environmental Planning and Assessment Regulation 2000* (**the 2000 EP&A Regulation**), the effect of some of the amendments in Schedule 2.1 is also described below.

Functions of certifying authorities

Schedule 1 [7], [8], [10] and [11] amend sections 81A and 86 of the 1979 EP&A

Act to require a principal certifying authority, rather than the person by whom he or she is appointed, to notify the relevant consent authority and council of the appointment at least 2 days before work commences for which the person is the principal certifying authority.

Proposed sections 81A (2) (b1) (ii) and (4) (b1) (ii) and 86 (1) (a1) (ii) of the 1979 EP&A Act will require a principal certifying authority to notify the person having the benefit of a development consent or complying development certificate of any critical stage or other inspections that will need to be carried out at various times in relation to proposed development for which the principal certifying authority has been appointed.

Schedule 1 [9] and [12] amend sections 81A and 86 of the 1979 EP&A Act to exempt Crown development from certain requirements of those sections.

Schedule 2.1 [7]–[10] and [15]–[18] make consequential amendments to clauses 103 and 135 of the 2000 EP&A Regulation to the amendments made to the 1979 EP&A Act relating to principal certifying authorities.

Schedule 1 [18] substitutes section 109E (1) of the 1979 EP&A Act, so as to provide that the appointment of a principal certifying authority for any development is to be made by the person having the benefit of the relevant development consent or complying development certificate, and inserts a new section 109E (1A) so as to prohibit such an appointment being made by a builder who is going to carry out the development unless the builder is the owner of the land concerned.

Schedule 1 [19] inserts new section 109E (3) and (4) into the 1979 EP&A Act to set out other functions of a principal certifying authority for building work or subdivision work. A principal certifying authority is required to be satisfied:

- (a) that a construction certificate is issued before work over which the principal certifying authority has control commences, and
- (b) that any head contractor for the work is the holder of the appropriate licence under, and is covered by the appropriate insurance required by, the *Home Building Act 1989* before any such residential building work commences, and
- (c) that any owner-builder who will carry out the work is the holder of an owner-builder permit under that Act before any such residential building work commences, unless excepted from that requirement, and
- (d) that, while the work is being carried out, it is inspected on such occasions as are prescribed by the regulations or otherwise required by the principal certifying authority before the principal certifying authority issues an occupation certificate or subdivision certificate for the building or work concerned, and
- (e) that compliance certificates have been issued for each matter as to which the principal certifying authority must be satisfied before issuing the relevant occupation certificate or subdivision certificate but in respect of which the principal certifying authority proposes to rely on compliance certificates issued by other persons, and
- (f) that any preconditions to the issue of an occupation certificate or subdivision certificate have been complied with before the certificate is issued.

A principal certifying authority must also comply with any other requirements imposed on principal certifying authorities by the regulations.

Schedule 2.1 [35] inserts a new clause 162A into the 2000 EP&A Regulation to specify occasions on which building work must be inspected, for the purposes of proposed section 109E (3) (d) of the 1979 EP&A Act. These compulsory inspections for building work are called **critical stage inspections** and will need to be supplemented by any other inspections required by a principal certifying

authority. This item also inserts a new clause 162B into that regulation requiring a principal certifying authority to keep records of inspections conducted, as referred to in proposed section 109E (3) (d) of the 1979 EP&A Act.

Schedule 2.1 [11] and [19] insert new clauses 103A and 135A into the 2000 EP&A Regulation which set out what is required to be included in a notice of critical stage inspections that must be given to the person having the benefit of a development consent or a complying development certificate by a principal certifying authority before work is commenced.

Schedule 1 [20] inserts a new section 109EA into the 1979 EP&A Act, replacing the existing section 109E (3) to be repealed by **Schedule 1 [19]**. New section 109EA will require the approval of an accreditation body to the replacement of a principal certifying authority who was accredited by that body and the approval of a consent authority or the council to the replacement of the consent authority or the council by another principal certifying authority.

Schedule 2.1 [34] replaces clause 162 of the 2000 EP&A Regulation. New clause 162 requires notice to be given to the consent authority and, if the consent authority is not the council, to the council of his or her appointment by a replacement principal certifying authority.

Schedule 1 [33] replaces section 109ZG (2) of the 1979 EP&A Act so as to relax the existing provision that prohibits an accredited certifier from issuing a Part 4A certificate for work in which he or she has been involved so that it no longer applies merely because he or she has been involved in preparing the plans and specifications for the work.

Schedule 1 [40] inserts new section 148A into the 1979 EP&A Act. That section will create offences if an accredited certifier performs his or her functions as a certifying authority otherwise than impartially.

Investigation of certifying authorities

Schedule 1 [37] inserts a new Division 1B into Part 6 of the 1979 EP&A Act. The new Division contains provisions enabling a Departmental auditor appointed by the Director-General of the Department of Infrastructure, Planning and Natural Resources (*the Director-General*) to investigate the work and activities of a council (proposed section 118P) or an accredited certifier (proposed section 118Q) acting in the capacity of a certifying authority. The powers of a Departmental auditor are set out in proposed section 118R.

Schedule 1 [29] repeals section 109U of the 1979 EP&A Act as a consequence of enacting proposed Division 1B, and **Schedule 1 [30]** makes a consequential amendment to section 109ZA of that Act.

Appointment and functions of head contractors

Schedule 1 [7] and [10] insert proposed new sections 81A (2) (b2) and 86 (1) (a2) into the 1979 EP&A Act. These provisions require the person having the benefit of a development consent or complying development certificate to appoint a head contractor for any building work to be carried out in accordance with a development consent or complying development certificate (otherwise than by an owner-builder). A person may be appointed as head contractor for residential building work only if the person is the holder of a contractor licence under the *Home Building Act 1989*.

The person having the benefit of the development consent or complying development certificate must notify the principal certifying authority of the appointment of a head contractor and (unless that person is appointed as the head contractor) must notify the head contractor of all critical stage and other inspections that will need to be carried out in connection with the work.

Obligations relating to the carrying out of building work are imposed on head contractors, as described below in explanations of particular amendments. They are required to give the principal certifying authority sufficient notice for critical

stage and other inspections to be made by certifying authorities and to maintain a sign showing their particulars on a building site.

Construction certificates

Schedule 1 [5] amends section 80 (12) of the 1979 EP&A Act so as to ensure that not only original plans and specifications for which a construction certificate is issued, but also variations to the construction certificate and those plans and specifications, form part of a development consent.

Schedule 1 [6] omits from section 80 of the 1979 EP&A Act certain provisions that require a development consent to identify the classification of a proposed building. **Schedule 2.1 [28] and [29]** amend clause 147 of the 2000 EP&A Regulation to make this a requirement of a construction certificate.

Schedule 2.1 [28] re-enacts in clause 147 of the 2000 EP&A Regulation the provision omitted from section 80 of the 1979 EP&A Act with respect to the classification of buildings.

Occupation certificates

Schedule 1 [21] inserts new subsections (1A)–(1D) into section 109H of the 1979 EP&A Act. Requirements for interim occupation certificates are removed from the regulations into this section (see subsections (1C) and (1D)). **Schedule 1 [23]** makes a consequential amendment by repealing section 109H (3).

Schedule 1 [22] amends section 109H (2) to acknowledge that a final occupation certificate will be issued to allow a use of a building (and not a change of building use).

Proposed section 109H (1) (b1) intended to be inserted by the *Building Legislation Amendment (Quality of Construction) Act 2002* has not been reenacted because it is now seen to impose an impractical requirement.

Schedule 1 [24] amends section 109M of the 1979 EP&A Act so as to set the maximum penalty for occupying a new building for which an occupation certificate has not been issued at 5 penalty units (\$550) for a class 1a or class 10 building (a dwelling-house or ancillary building) and 1,000 penalty units (\$110,000) for any other building.

Schedule 1 [25] amends section 109N of the 1979 EP&A Act so as to remove a minor ambiguity of expression.

Schedule 2.1 [32] amends clause 156 of the 2000 EP&A Regulation so as to repeal a provision that currently exempts class 1a and class 10 buildings (dwelling-houses and ancillary buildings) from the requirement for an occupation certificate.

Other miscellaneous matters

Schedule 1 [1] and [2] amend section 4 (1), the provision containing definitions for the purposes of the 1979 EP&A Act, so that references to the *Building Code of Australia* may be updated by the regulations under that Act and so as to insert new definitions of **critical stage inspections**, **head contractor**, **owner-builder** and **residential building work** which are used in other amendments.

Schedule 1 [3] and [4] amend section 22 of the 1979 EP&A Act so as to specifically allow the Minister to establish committees for the purposes of administration of the Act and to appoint a Chairperson to such a committee.

Schedule 1 [13] amends section 105 of the 1979 EP&A Act to authorise a consent authority or council to impose a fee with respect to the lodging of a complying development certificate with it.

Schedule 1 [14] amends section 109C of the 1979 EP&A Act so as to make it clear that a single compliance certificate can deal with a number of matters.

Schedule 1 [15] and [16] amend section 109D of the 1979 EP&A Act to allow the council of the area in which the development is carried out to issue a compliance, construction, occupation or subdivision certificate.

Schedule 1 [17] amends section 109D (3) of the 1979 EP&A Act so as to remove

a minor ambiguity of expression.

Schedule 1 [26] amends section 109Q of the 1979 EP&A Act so as to enable the regulations under Part 4A of that Act to authorise the imposition of a fee with respect to Part 4A certificates that are lodged with a consent authority or council.

Schedule 1 [27] and [28] amend section 109T of the 1979 EP&A Act so as to allow an accreditation body:

- (a) to impose conditions on a person's accreditation by the body in accordance with its authorisation as an accreditation body, and
- (b) to rely on a certificate of currency issued by an insurance company or an appropriate current insurance policy when determining whether or not an accredited certifier is covered by the required insurance.

Schedule 1 [30] and [31] amend section 109ZA of the 1979 EP&A Act so as:

- (a) to update cross-references to other sections, and
- (b) to increase the maximum fine that may be ordered by the Administrative Decisions Tribunal to be paid by an accredited certifier found guilty of unsatisfactory professional conduct or professional misconduct from 300 penalty units (currently \$33,000) to 1,000 penalty units (currently \$110,000).

Schedule 1 [32] amends section 109ZF of the 1979 EP&A Act so that complaints against a person who was an accredited certifier, but whose right to practise as such has been suspended, or whose accreditation has lapsed, may be made and dealt with in the same way as complaints against an accredited certifier whose accreditation has been withdrawn.

Schedule 1 [34] amends section 109ZN of the 1979 EP&A Act so as to allow a council employee to act as an accredited certifier outside the council area if covered by the council's general insurance policy in relation to those activities.

Schedule 1 [35] amends section 116G of the 1979 EP&A Act so as to remove an unnecessary cross-reference to another provision of the Act.

Schedule 1 [36] amends section 118A of the 1979 EP&A Act so as to make it clear that a principal certifying authority's power of entry on to land applies only for the purpose of the exercise of functions of a principal certifying authority under that Act and the 2000 EP&A Regulation.

Schedule 1 [38] amends section 121H of the 1979 EP&A Act so as to require a council to notify the principal certifying authority for any development being carried out before it gives an order under Division 2A of Part 6 of that Act in respect of any aspect of the development.

Schedule 1 [39] amends section 127 of the 1979 EP&A Act so as to allow proceedings for an offence against the Act or regulations made under it to be commenced not later than 2 years after the offence was alleged to be committed.

Schedule 1 [41] amends section 157 of the 1979 EP&A Act to add a further regulation-making power that will specifically allow regulations to be made under that Act for the purpose of signs relating to the carrying out of development or persons involved with the carrying out of development.

Savings and transitional provisions

Schedule 1 [42] and [44] amend Schedule 6 to the 1979 EP&A Act so as to enact certain savings and transitional provisions consequent on the amendments to that Act by the proposed Act explained above and so as to enable the regulations under that Act to enact further savings and transitional provisions.

Schedule 1 [43] repeals certain savings inserted into that Act prematurely by amendments made by the *Building Legislation Amendment (Quality of Construction) Act 2002*.

Schedule 2 Amendment of regulations

The various amendments to the *Environmental Planning and Assessment Regulation 2000* (**the 2000 EP&A Regulation**) that are not referred to above are

explained below, as is the amendment to the *Environmental Planning and Assessment (Savings and Transitional) Regulation 1998 (the 1998 EP&A Regulation)*.

Conditions of development consents and complying development certificates

Schedule 2.1 [3] amends clause 98 of the 2000 EP&A Regulation so as to make it a condition of a development consent that any insurance required for residential building work by the *Home Building Act 1989* must be in place before the work is commenced. **Schedule 2.1 [22]** amends clause 136A (renumbered clause 133) of that regulation to make a parallel requirement a condition of a complying development certificate.

Schedule 2.1 [4] and [23] insert clauses 98A and 98B (in relation to development consents) and clauses 136B and 136C (in relation to complying development certificates) into the 2000 EP&A Regulation. Clauses 98A and 136B require the erection of signage at building and demolition sites identifying the principal certifying authority for the work and the head contractor, and stating that unauthorised entry to the site is prohibited. Clauses 98B and 136C require the council to be given notice of the head contractor's licence number or owner-builder's permit number, and the name of the insurer for the work, under the *Home Building Act 1989*. The requirements are imposed as conditions of a development consent or complying development certificate.

Schedule 2.1 [2], [20] and [21] make consequential amendments to the 2000 EP&A Regulation.

Plans

Schedule 2.1 [6] amends clause 100 of the 2000 EP&A Regulation so as to require a notice of determination of a development application that is granted to include a copy of any endorsed plans relating to the development.

Schedule 2.1 [12] amends clause 122 of the 2000 EP&A Regulation to require a notice of determination of an application for modification of a development consent that is granted to include a copy of any endorsed plans relating to the modified consent.

Schedule 2.1 [14] amends clause 134 of the 2000 EP&A Regulation so as to require a complying development certificate for any development to include a copy of any endorsed plans relating to the development.

Time for giving notices

Schedule 2.1 [13], [25], [27], [31] and [33] amend clauses 130, 138, 142, 151 and 160 of the 2000 EP&A Regulation so as to shorten, from 7 days to 2 days, the time within which certain notices are to be given to the council by an accredited certifier with respect to complying development certificates, compliance certificates, construction certificates, occupation certificates and subdivision certificates.

Notice of modification of construction certificate

Schedule 2.1 [30] amends clause 148 of the 2000 EP&A Regulation so as to require the Commissioner of NSW Fire Brigades to be notified if the construction certificate for a proposed building that had originally been referred to the Commissioner for evaluation is subsequently modified in such a manner that the building concerned is no longer such as to require evaluation by the Commissioner.

Records

Schedule 2.1 [39] and [41] amend clauses 200 and 202 of the 2000 EP&A Regulation so as to require an accreditation body to keep telephone numbers for its accredited certifiers in its register and the Director-General to keep telephone numbers of all accredited certifiers on the central register.

Schedule 2.1 [42] amends clause 205 of the 2000 EP&A Regulation so as to

require an accredited certifier to keep a record of each critical stage inspection required to be made by the accredited certifier. **Schedule 2.1 [43]** amends the same clause to require that record to be kept for 15 years after the time of the inspection.

Schedule 2.1 [40] corrects a cross-reference.

Other miscellaneous matters

Schedule 2.1 [1] replaces clause 51 (1) of the 2000 EP&A Regulation so as to declare that a development application may be rejected by a consent authority within 7 days of receiving it if it does not contain information, or is not accompanied by any document, required by that regulation.

Schedule 2.1 [5] amends clause 100 of the 2000 EP&A Regulation so as to require a notice of determination of a development application that allows development involving a building to specify the class of the building if a construction certificate is not required.

Schedule 2.1 [7]–[9] amend clause 103 of the 2000 EP&A Regulation so as to require the name of the person appointing the principal certifying authority (instead of the name of the person giving the notice) to be specified in a notice of appointment of a principal certifying authority and to update a cross-reference in that clause.

Schedule 2.1 [24] amends clause 138 (1) (e) of the 2000 EP&A Regulation so as to require formal particulars of title to be included in a compliance certificate.

Schedule 2.1 [26] inserts a new clause 139A into the 2000 EP&A Regulation which makes it clear that an application for a construction certificate may be withdrawn and allows the whole or part of the application fee for the certificate to be retained by the certifying authority in such a case.

Schedule 2.1 [36] replaces clause 163 of the 2000 EP&A Regulation. The new clause will require a head contractor for a building site and an owner-builder to give the principal certifying authority at least 48 hours notice before commencing any building work that requires a prior critical stage inspection so that the inspection may be carried out before the work is commenced.

Schedule 2.1 [37] and [38] amend clauses 170 and 175 of the 2000 EP&A Regulation so as to allow a final fire safety certificate and an annual fire safety statement for a building to be issued on behalf of (instead of always by) the owner of the building.

Schedule 2.1 [44] inserts new Part 13A (clause 227A) into the 2000 EP&A Regulation. The clause will require a principal certifying authority and a head contractor for building work, subdivision work or demolition work each to make sure that a sign displaying specified particulars is erected and maintained on the building site until that work is carried out.

Schedule 2.1 [45] makes a minor amendment to Schedule 1 to the 2000 EP&A Regulation confirming that details of a development consent are required in an application for a construction certificate only if a relevant consent has been granted.

Environmental Planning and Assessment (Savings and Transitional) Regulation 1998

Schedule 2.2 omits clause 51 of the 1998 EP&A Regulation so as to terminate a savings provision that allows certain activities to be carried out under former provisions of the *Local Government Act 1993*, rather than those of the 1979 EP&A Act.