

Building Professionals Bill 2005

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

Overview of Bill

The objects of this Bill are:

- (a) to establish the Building Professionals Board (***the Board***), and
- (b) to remove provisions from the *Environmental Planning and Assessment Act 1979* that provide for certain professional associations to accredit persons as accredited certifiers for the purposes of that Act, and
- (c) to provide for an accreditation scheme where the Board issues certificates of accreditation for persons as accredited certifiers for the purposes of that Act, and
- (d) to transfer (with modifications) the complaints process and disciplinary scheme relating to accredited certifiers from that Act and provide for it to be administered by the Board, and
- (e) to transfer other provisions relating to accredited certifiers from that Act.

The Bill also makes the following amendments to the *Environmental Planning and Assessment Act 1979*:

- (a) to provide that construction certificates are of no effect if issued after the commencement of the building work or subdivision work to which they relate,
- (b) to modify the provisions relating to the accreditation of building components, processes and designs,
- (c) to prevent a requirement to obtain a compliance certificate being placed on a development consent or complying development certificate.

Outline of provisions

Part 1 Preliminary

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

Clause 2 provides for the commencement of the proposed Act.

Clause 3 defines certain words and expressions used in the proposed Act.

Part 2 Accreditation of certifiers

Division 1 Accreditation scheme

Clause 4 requires the Board to prepare an accreditation scheme to be adopted by the Minister for the accreditation of persons as accredited certifiers. Accredited certifiers are authorised to perform various functions under the *Environmental Planning and Assessment Act 1979* in relation to the certification of development under that Act. The proposed scheme is to undergo a public consultation process. The accreditation scheme may provide for the qualifications, skills, knowledge and experience required for accreditation under the proposed Act, a code of conduct for accredited certifiers, continuing professional development requirements for accredited certifiers and other matters prescribed by the regulations. Clause 6 of Schedule 2 provides that the Minister may, by order, adopt as the first accreditation scheme a document that has been published and publicly exhibited by a government department or statutory authority.

Division 2 Accreditation of accredited certifiers

Clause 5 enables a person (other than a body corporate) to apply to the Board for a certificate of accreditation as an accredited certifier or the renewal of such a certificate.

Clause 6 sets out the procedures for considering applications.

Clause 7 specifies the circumstances in which the Board may refuse applications.

Clause 8 sets out the circumstances in which the Board may suspend or cancel a person's certificate of accreditation otherwise than on disciplinary grounds, for example, because it was issued in error or the person has failed to obtain insurance.

Clause 9 enables the Board to vary or impose conditions on certificates of

accreditation.

Clause 10 specifies the duration of a certificate of accreditation (generally, one year).

Clause 11 requires the Board to keep a register containing certain particulars about accredited certifiers.

Division 3 Powers of the Board for the protection of the public

Clause 12 enables the Board by order to suspend (for a period of up to 8 weeks) a person's certificate of accreditation or place conditions on a certificate without first giving notice and receiving submissions if satisfied that it is necessary to do so to protect the safety or property of any person.

Clause 13 enables the Board to vary an order given under clause 12.

Clause 14 requires a matter in respect of which the Board takes action under the proposed Division to be treated by the Board as if it were a complaint. The effect of this provision is to apply the provisions of proposed Part 3 to the matter.

Clause 15 enables the Board to extend a period of suspension under the proposed Division if the extension has been expressly approved by the President or Deputy President of the Board and the matter is still in the process of being dealt with as a complaint.

Clause 16 deals with the effect of the expiration of a suspension under the proposed Division.

Clause 17 provides for the duration of conditions imposed under the proposed Division.

Division 4 General provisions

Clause 18 provides a right of review to the Administrative Decisions Tribunal in relation to specified decisions of the Board under the proposed Part.

Part 3 Disciplinary proceedings

Division 1 Preliminary

Clause 19 defines certain terms and expressions used in the proposed Part, including *professional misconduct* and *unsatisfactory professional conduct*.

Clause 20 provides that the proposed Part extends to persons who have ceased to be accredited certifiers under the proposed Act and provides that complaints are not to be made or dealt with if the accredited certifier concerned has died.

Division 2 Making of complaints and preliminary procedures

Clause 21 enables any person to make a complaint to the Board against an accredited certifier in respect of the accredited certifier's professional conduct.

Clause 22 provides for the initial assessment of a complaint by the Board.

Clause 23 enables the Board to dismiss a complaint in specified circumstances.

Clause 24 enables the Board to arrange for conciliation of a complaint in appropriate cases.

Clause 25 enables the Board to refer a complaint to another person or body if the complaint raises issues that require investigation by that other person or body.

Clause 26 enables a complainant to withdraw a complaint. However, the Board may continue to deal with it if it thinks that it raises an issue of professional misconduct or unsatisfactory professional conduct.

Division 3 Investigation of complaints

Clause 27 requires the Board to investigate complaints and provides for how multiple complaints may be dealt with.

Clause 28 requires the Board to conduct an investigation into a complaint expeditiously.

Division 4 Procedure after investigation of complaint

Clause 29 requires an authorised officer who is appointed to investigate a complaint to provide a report of the investigation to the Board. The Board is to give a copy to the person who is the subject of the complaint and provide an opportunity to make

submissions.

Clause 30 enables the Board to hold one or more meetings to consider a complaint and provides for the procedure of the Board at any such meeting.

Clause 31 provides that, after the investigation of a complaint, the Board may take certain action. If the Board is satisfied that the accredited certifier concerned is not guilty of professional misconduct or unsatisfactory professional conduct, it must dismiss the complaint. If the Board is satisfied that the accredited certifier is guilty of professional misconduct, it must apply to the Tribunal for a disciplinary finding against the accredited certifier. If the Board is satisfied that the accredited certifier is guilty of unsatisfactory professional conduct (but not professional misconduct), it may apply to the Tribunal for a disciplinary finding against the accredited certifier or it may itself take any one or more of the following actions against the accredited certifier:

- (a) caution or reprimand the accredited certifier,
- (b) by order impose such conditions on the accredited certifier's certificate of accreditation as it considers appropriate,
- (c) order that the accredited certifier complete such educational courses as are specified by the Board within the time specified by the Board,
- (d) order that the accredited certifier report on his or her practice as an accredited certifier at the times, in the manner and to the persons specified by the Board,
- (e) order the accredited certifier to pay to the Board a fine of an amount not exceeding 100 penalty units (currently \$11,000) within the time specified by the Board,
- (f) order that no further action is to be taken by the Board in relation to the complaint if satisfied that the accredited certifier is generally competent and diligent and that no other material complaints (whether or not the subject of a disciplinary finding) have been made against the accredited certifier.

Clause 32 requires the Board to give a written statement of its decision on a complaint to the complainant and the accredited certifier concerned.

Clause 33 enables a person to apply to the Administrative Decisions Tribunal for a review of a decision made by the Board under clause 31.

Division 5 Role of Tribunal in complaints process

Clause 34 enables an application to be made by the Board to the Administrative Decisions Tribunal for a disciplinary finding against an accredited certifier. If the Tribunal finds that the accredited certifier is guilty of professional misconduct or unsatisfactory professional conduct the Tribunal may make any of the following decisions:

- (a) caution or reprimand the accredited certifier,
- (b) direct that such conditions as it considers appropriate be imposed on the accredited certifier's certificate of accreditation,
- (c) order that the accredited certifier complete such educational courses as are specified by the Tribunal,
- (d) order that the accredited certifier report on his or her practice as an accredited certifier at the times, in the manner and to the persons specified by the Tribunal,
- (e) order the accredited certifier to pay to the Board a fine of an amount, not exceeding 1,000 penalty units (currently \$110,000), specified in the order,
- (f) order the accredited certifier to pay to the complainant such amount (not exceeding \$20,000) as the Tribunal considers appropriate by way of compensation for any damage suffered by the complainant as a result of the unsatisfactory professional conduct or professional misconduct,
- (g) suspend the accredited certifier's certificate of accreditation for such period as the Tribunal thinks fit,
- (h) cancel the accredited certifier's certificate of accreditation,

(i) order that the accredited certifier cannot re-apply for a certificate of accreditation within such period (including the period of his or her lifetime) as may be specified by the Tribunal.

Clause 35 enables the Administrative Decisions Tribunal to award costs in proceedings on an application under proposed Part 3.

Clause 36 provides for an appeal against a decision of the Administrative Decisions Tribunal under the proposed Division to the Appeal Panel of the Tribunal.

Clause 37 provides that the Administrative Decisions Tribunal is not required to include confidential information in its statement of a decision. If the statement would be false or misleading without the confidential information, the Tribunal is not required to provide the statement. However, a confidential information notice must then be provided indicating that confidential information is not given or the statement will not be provided.

Division 6 Publicising disciplinary action

Clause 38 defines certain terms used in the proposed Division.

Clause 39 requires the Board to publicise disciplinary action taken against an accredited certifier or former accredited certifier.

Clause 40 requires the Board to keep a register of disciplinary action and to make it available to the public.

Clause 41 requires the Board to publicise the quashing or variation on appeal or review of any disciplinary action taken against an accredited certifier or former accredited certifier and to alter the register of disciplinary action to reflect the quashing or variation of the action.

Clause 42 provides that no liability is incurred by the State, the Board, the Director of the Board or a person acting at the direction of the Board or Director in respect of anything done in good faith for the purpose of publicising disciplinary action or otherwise carrying out functions under the proposed Division. It also provides that no liability is incurred by a person who publishes a fair report or summary of disciplinary action that is publicised.

Clause 43 specifies what matters cannot be published when publicising disciplinary action.

Division 7 Miscellaneous

Clause 44 provides that an accredited certifier may disclose confidential information if required under the proposed Act by the Board or the Tribunal despite any duty of confidentiality.

Part 4 Investigation of certifying authorities

Clause 45 enables the Board to appoint a member of its staff as an authorised officer to investigate the work and activities of a council in its capacity as a certifying authority under the *Environmental Planning and Assessment Act 1979*. The authorised officer is to furnish a report on the investigation to the council and the Director-General of the Department of Local Government including recommendations on matters that should be addressed by the council. The council is given an opportunity to make submissions on the report. The clause is similar to section 118P of that Act which is to be repealed by the proposed Act.

Clause 46 enables the Board to appoint a member of its staff as an authorised officer to investigate the work and activities of an accredited certifier in his or her capacity as a certifying authority under the *Environmental Planning and Assessment Act 1979*. The authorised officer is to furnish a report on the investigation to the accredited certifier and give the accredited certifier an opportunity to make submissions on the report. If satisfied that the accredited certifier may be guilty of professional misconduct or unsatisfactory professional conduct, the Board may take action under proposed Part 3 as if the matter were a complaint. The clause is similar to section 118Q of that Act which is to be repealed by the proposed Act.

Clause 47 extends the operation of the proposed Part to persons who are no longer

accredited certifiers.

Part 5 Powers relating to investigations

Division 1 Powers of Board and authorised officers to require production of evidence

Clause 48 enables the Board or an authorised officer to direct a person to appear in person to give evidence, to produce documents or to authorise the Board or officer to obtain documents for the purposes of carrying out an investigation into a complaint under proposed Part 3 or an investigation under Part 4.

Division 2 Power of entry to premises

Clause 49 gives an authorised officer the power to enter premises for the purposes of carrying out an investigation.

Clause 50 sets out the powers of an authorised officer to inspect premises when carrying out an investigation.

Clause 51 enables an authorised officer to use reasonable force to enter premises for the purposes of an investigation but only if specifically authorised by the Board in the particular circumstances.

Clause 52 requires notice to be given to the Board and appropriate persons in the event that force is used to enter premises.

Clause 53 requires an authorised officer to cause as little damage as possible when exercising functions under the proposed Part.

Clause 54 requires the Board to pay compensation for damage caused when an authorised officer enters premises under the proposed Part, but not if the inspection reveals that there has been a contravention of the proposed Act, the *Environmental Planning and Assessment Act 1979*, the regulations under those Acts or an environmental planning instrument.

Clause 55 provides that an authorised officer is to be issued with a written authority that is to be produced when the authorised officer is exercising functions under the proposed Part (otherwise than in accordance with a search warrant).

Clause 56 provides that the powers of entry under the proposed Part may not be used in relation to residential premises without the consent of the occupier or the authority of a search warrant.

Clause 57 provides for the issue of search warrants for the purposes of the proposed Part.

Division 3 General provisions

Clause 58 makes it an offence to obstruct, hinder or interfere with an authorised officer in the carrying out of his or her functions under the proposed Part or to fail to comply with a requirement of the Board or an authorised officer under the proposed Part.

Clause 59 removes the defence of self-incrimination in relation to the answering of questions and the provision of documents and information in accordance with requirements under the proposed Act. However, the answers, documents or information can only be used in criminal proceedings relating to failure to comply with requirements under the proposed Part or providing false information.

Part 6 Requirements relating to accredited certifiers

Division 1 Record keeping and notifications

Clause 60 requires accredited certifiers to keep documents and records in accordance with the regulations under the proposed Act.

Clause 61 specifies certain matters that an accredited certifier must notify to the Board.

Division 2 Insurance

Clause 62 provides that the proposed Division applies to accredited certifiers and persons prescribed by the regulations as building practitioners.

Clause 63 makes it an offence for an accredited certifier to exercise functions as a certifying authority or claim to be covered by insurance unless he or she holds the

insurance required by the proposed Division.

Clause 64 makes it an offence for a building practitioner to carry out building work or subdivision work or claim to be covered by insurance unless he or she holds the insurance required by the proposed Division.

Clause 65 enables regulations to be made in relation to insurance required to be held under the proposed Division.

Division 3 Conflicts of interest

Clause 66 makes it an offence for an accredited certifier to issue a Part 4A certificate or complying development certificate under the *Environmental Planning and Assessment Act 1979* in certain specified circumstances that could involve conflicts of interest.

Clause 67 explains the meaning of being involved in the design of an aspect of development for the purposes of the proposed Division.

Clause 68 explains the meaning of being related to another person for the purposes of the proposed Division.

Clause 69 explains the meaning of being associated with a council for the purposes of the proposed Division.

Clause 70 explains the meaning of having a pecuniary interest for the purposes of the proposed Division.

Clause 71 enables the Board to grant exemptions from certain requirements of clause 66.

Division 4 Other offences relating to improper conduct

Clause 72 makes it an offence for an accredited certifier to act beyond the authorisation conferred by his or her certificate of accreditation.

Clause 73 makes it an offence for an accredited certifier to contravene a term or condition of the certificate of accreditation.

Clause 74 requires a person (other than a council) who is appointed as a principal certifying authority under the *Environmental Planning and Assessment Act 1979* in relation to development to give notice of certain matters that would affect the person's ability to carry out the functions of principal certifying authority to the person who made the appointment.

Part 7 Constitution and management of Board

Clause 75 provides for the constitution of the Building Professionals Board as a body corporate.

Clause 76 provides for the membership and procedure of the Board.

Clause 77 sets out the functions of the Board.

Clause 78 provides for the employment of a Director of the Board and such other staff as are necessary to enable the Board to exercise its functions. The proposed section also enables the Board to make use of the services of consultants.

Clause 79 provides for the appointment of committees of the Board.

Clause 80 enables the Board to delegate its functions, subject to certain restrictions.

Clause 81 provides for the establishment of the Building Professionals Board Fund.

Part 8 Miscellaneous

Clause 82 enables the Board to notify employers and other appropriate persons of various decisions made in relation to a person's certificate of accreditation.

Clause 83 makes it an offence for a person to disclose or use certain information obtained in the administration of the proposed Act except in specified circumstances. The clause also makes it an offence for a person to influence the determination of a development application and other specified decisions made under the *Environmental Planning and Assessment Act 1979* for personal gain or for the gain of a person closely associated with him or her. This mirrors section 148 of that Act.

Clause 84 makes it an offence for an accredited certifier to take bribes and for a person to give bribes to an accredited certifier. This provision mirrors section 148A of the *Environmental Planning and Assessment Act 1979* which is repealed by the

proposed Act.

Clause 85 makes it an offence for a person to issue a Part 4A certificate or complying development certificate under the *Environmental Planning and Assessment Act 1979* if not authorised to do so or to make false or misleading statements in connection with the issue of those certificates.

Clause 86 makes it an offence to impersonate an authorised officer.

Clause 87 requires chief executive officers of professional associations that were previously authorised as accreditation bodies under the *Environmental Planning and Assessment Act 1979* to provide to the Board copies of specified records and documents that related to the accreditation of persons by the association and to complaints against those persons.

Clause 88 makes provision for the service of documents under the proposed Act.

Clause 89 excludes Board members, the Director, committee members and persons following their directions from personal liability for certain acts done in good faith for the purpose of executing the proposed Act or any other Act.

Clause 90 provides that fees and other charges payable to the Board under the proposed Act may be recovered by the Board as a debt and that fines recovered under the Act (other than for offences) are to be paid to the Board.

Clause 91 enables the Director to give certificates as to certain matters that are admissible as evidence of those matters.

Clause 92 enables penalty notices to be issued for offences against the proposed Act or the regulations being offences prescribed by the regulations.

Clause 93 provides that an offence under the proposed Act or the regulations may be dealt with summarily by a Local Court or the Land and Environment Court and places limitations on the penalty that may be imposed in proceedings brought in a Local Court.

Clause 94 enables the Governor to make regulations for the purposes of the proposed Act.

Clause 95 is a formal provision that gives effect to the savings, transitional and other provisions set out in Schedule 2.

Clause 96 is a formal provision that gives effect to the amendments to the Acts and regulation set out in Schedule 3.

Clause 97 provides for the review of the proposed Act in 5 years.

Schedule 1 Constitution and procedure of Board

Schedule 1 contains provisions relating to the constitution of the Board and the procedure of the Board.

Schedule 2 Savings, transitional and other provisions

Schedule 2 contains savings, transitional and other provisions consequent on the enactment of the proposed Act.

Schedule 3 Amendment of Acts and regulation

Schedule 3 makes consequential amendments to the Acts and regulation specified in the Schedule.

Schedule 3 also makes the following amendments to the *Environmental Planning and Assessment Act 1979*:

(a) Amendments to substitute sections 79C (4), 85A (4) and 109F (2) of that Act to provide that consent authorities and certifying authorities cannot refuse to issue development consents, complying development certificates or construction certificates on the ground that a building product or system does not comply with a requirement of the *Building Code of Australia* if the building product or system has been accredited in relation to that requirement in accordance with the regulations.

(b) An amendment to section 105 of that Act to make it clear that the regulations may adopt, apply or incorporate a scheme for the accreditation of building

products or systems.

(c) Amendments to sections 80A and 85 of that Act to prevent a requirement to obtain a compliance certificate being placed on a development consent or complying development certificate.

(d) An amendment to section 109F of that Act to make it clear that a construction certificate has no effect if it is issued after the building work or subdivision work to which it relates has already physically commenced. A savings provision is included in relation to work that had physically commenced before the commencement of the amendment.