



NSW Legislative Assembly Hansard

Building Professionals Bill

Extract from NSW Legislative Assembly Hansard and Papers Wednesday 25 May 2005.

Second Reading

Ms DIANE BEAMER (Mulgoa—Minister for Juvenile Justice, Minister for Western Sydney, and Minister Assisting the Minister for Infrastructure and Planning (Planning Administration)) [9.10 p.m.]: I move:

That this bill be now read a second time.

The Building Professionals Bill comes as a further demonstration of the Government's commitment to improving the quality of building in the State. The 2002 Campbell inquiry into the quality of buildings, conducted by a committee of this Parliament, concluded that the building regulatory system in New South Wales was complex, poorly co-ordinated, poorly understood, and lacking in professional rigour. The inquiry recommended increasing the Government's role in regulating builders and other practitioners in the building industry. In 2003 the Government established the Home Building Service to deal with complaints against licensed builders and tradespeople who carry out residential building work. This bill will establish the Building Professionals Board and, in so doing, extend the Government's building reform program to now include certifiers—the people who check the regulatory compliance of building and subdivision work.

The reforms outlined in the bill will significantly improve our regulatory and administrative framework for certifiers in New South Wales and, ultimately, will help ensure the safety and quality of all building work. In January 2004, as a prelude to the bill, the Building Professionals Board was established administratively within the Department of Infrastructure, Planning and Natural Resources. The department now accredits more than 170 private certifiers. Last year the Government successfully completed its first action against a private certifier for professional misconduct. In the New South Wales Administrative Decisions Tribunal this certifier was found guilty of professional misconduct for setting aside fire safety provisions in a backpackers' hostel in Sydney. The potential threat to life and property caused by that certifier's actions clearly demonstrates the importance of a strong regulatory framework for accrediting and disciplining certifiers as proposed in the bill.

The bill introduces major improvements to the accreditation system and complaints investigation process for private certifiers. The major benefits of the bill include the creation of uniform professional standards for private certifiers, a simpler regulatory system, and stronger measures to protect the safety and property of the public. Four existing accreditation schemes and accreditation bodies will be replaced by one system of accreditation. An independent statutory body—the Building Professionals Board—will be created. Its primary role will be to accredit, audit and investigate complaints against all private certifiers in New South Wales. In addition, the bill expands the sanctions available against private certifiers found guilty of unprofessional conduct. New emergency suspension powers will be introduced, and tough conflict of interest provisions will apply. Accreditation and disciplinary details about every certifier will be made available to the public so that people can make informed choices about using a certifier.

I am pleased to report that there is broad industry and stakeholder support for the establishment of the board. Supporters of the legislation include the Housing Industry Association, the Australian Institute of Building, the Association of Accredited Certifiers, the Australian Institute of Building Surveyors, and the Professional Surveyors Occupational Association. Like the Government, they see major benefits in creating a single accreditation body for certifiers and in the independence of the board. The Department of Infrastructure, Planning and Natural Resources has run consultation sessions with key stakeholders while developing proposals to create the board and more recently on a draft of this bill. These sessions have involved private certifiers, local government, developer groups and professional associations representing engineers, building surveyors, land surveyors and planners.

The Government is committed to accrediting council certifiers so that all certifiers in New South Wales are subject to equivalent competency standards. However, the impact on council services, particularly for rural and regional areas, needs to be carefully worked through in greater detail with local government. Therefore, at this stage it is proposed to limit the board's accreditation and disciplinary powers to private certifiers. The board will continue to audit local councils in their role as certifying authorities. Findings on the conduct of council certification will continue to be referred to the Department of Local Government and to the council concerned. Together with the review of building licensing announced by my colleague the Minister for Fair Trading, these initiatives demonstrate that the Government is serious about strengthening public confidence in our building regulation framework and, ultimately, in protecting the New South Wales community.

I turn now to the provisions of the bill. Part 2 deals with accreditation, which is a certifier's licence to practice. The Building Professionals Board will accredit certifiers to issue certain certificates for developments under the

Environmental Planning and Assessment Act. Accreditation will be based on the certifier's qualifications, skills, knowledge, and experience. The board will assign the certifier's level of accreditation fitting with their competence. Annual renewal of accreditation is retained from the current systems of accreditation. This will allow the board to ensure that private certifiers have current professional indemnity insurance and are up to date with changes in the industry. Continuous improvement is built into the accreditation system, which means that renewal of a certifier's accreditation will be dependent on them undertaking ongoing professional training each year. The Department of Infrastructure, Planning and Natural Resources is already discussing new education courses for certifiers with educational institutions.

The bill requires the Government to produce a single accreditation scheme setting out the qualifications, skills, and experience requirements for all accredited certifiers. The scheme will update and replace several existing accreditation schemes. The potential for certifiers to shop around for more lenient accreditation requirements, and the overlap between the existing schemes, will be eliminated. The Institution of Engineers Australia, the Professional Surveyors and Occupational Association, and the Planning Institute of Australia—the professional associations that administer existing accreditation schemes—have been working closely with my department to develop the new accreditation scheme. Representatives from unions, accredited certifiers, the Australian Building Codes Board and local government have also been involved.

The bill provides for the scheme to be publicly exhibited. I expect this new scheme to be exhibited within the next few months. The commencement of the accreditation aspects of the bill will be delayed until the new scheme is in place. This will allow for an orderly transition from the current systems, and time for accredited certifiers to become familiar with the new legislative and accreditation requirements.

Any decision to limit or prevent someone from working in their chosen profession is a serious matter. For this reason, any decision of the board in relation to a private certifier's accreditation will be contestable in the Administrative Decisions Tribunal. In most cases the board will be required to give the certifier the opportunity to make submissions on any proposal to downgrade, condition, suspend or cancel their accreditation. However, a direct right of review by the Administrative Decisions Tribunal will also apply on these decisions.

Public access to information on accredited certifiers will be improved under the proposals in the bill. The board will be required to maintain a public register of all accredited certifiers, with details of their level of accreditation and any conditions on their accreditation. Work is already well under way on improving the department's existing web-based register for that purpose. My colleague the Hon. David Campbell stated in his 2002 report that the building regulation system in New South Wales should rely on the three core pillars: responsibility, accountability, and liability. The Building Professionals Bill has been underpinned by those principles. The system proposed is tough, but it is fair.

The bill quite properly places the regulatory roles of accrediting and investigating complaints against private certifiers into the hands of an independent statutory authority, responsible to the Government. Professional associations will be able to focus on their traditional roles of representing and promoting their profession, rather than being in the difficult position of investigating and disciplining their peers. The Building Professionals Board will have a maximum of eight members and will be responsible to me as Minister. I will ask the board to ensure that resources are particularly focused on investigating complaints and conducting audits, as recommended by the Campbell inquiry.

Parts 3 and 4 of the bill deal with disciplinary proceedings and the investigation of certifying authorities. The board will have the power to investigate complaints and audit private certifiers and councils who act as certifying authorities. The bill provides for any person to make a complaint about the professional conduct of an accredited certifier. Many of the complaints that the Department of Infrastructure, Planning and Natural Resources presently receives are from councils or from a neighbour to a particular development. Often the complaint is that the building work does not comply with the development as approved by the council. For example, that the required fire safety measures are not in place, that the building may be taller than the approved plans, or that required noise attenuation measures are not met.

The potential impact of an illegal development can range from threatening life and property, to annoyance or a reduction of a neighbour's amenity and the normal use and enjoyment of their land. A certifier who approves building work that clearly does not comply with a council's development consent is in breach of the Environmental Planning and Assessment Act. Under the provisions of this bill the certifier may also be guilty of unprofessional conduct. If the action is relatively minor—for instance, a mistake—the bill provides that the certifier may be cautioned or reprimanded by the board. If the matter is more serious, the certifier may be allowed to continue his work but only on more straightforward buildings. In the most serious cases the certifier's licence to practice—his accreditation—may be withdrawn by the board. They are the situations the board will deal with but with increased and more effective powers.

The matters that constitute unsatisfactory professional conduct will be expanded. New grounds of unsatisfactory professional conduct are also created: contravening a law relating to the functions or obligations of an accredited certifier; failing to comply with a statutory or other duty or contractual obligation relevant to an

accredited certifier's functions; breaching a term or condition of accreditation; failing to comply with a board or tribunal order or with an investigatory requirement without reasonable excuse; wilfully misleading or obstructing the board in its disciplinary proceedings; and other improper or unethical conduct relevant to the duties of an accredited certifier. The certifier will have a right of review of the board's decision on a disciplinary matter in the Administrative Decisions Tribunal. As is usually the case with investigating the conduct of professionals, more serious matters—matters of professional misconduct—will be determined by the Administrative Decisions Tribunal. The tribunal will have the full range of sanctions available to it, but with the addition of fines up to \$110,000, ordering the accredited certifier to pay to the complainant compensation up to \$20,000, or suspending or cancelling the certifier's accreditation.

The possibility of an accredited building certifier having a conflict of interest is also of concern. In some circumstances, an accredited certifier's relationship with a developer or building design consultant has the potential to seriously undermine the integrity and objectivity of the certifier's role and their decisions. Certifiers are public authorities. The regulatory work of checking the compliance of building or subdivision with regulations and accepted standards should not in any way be affected by involvement in designing the development. At worst, this can amount to self-certification. The bill introduces a new conflict of interest provision to prevent private certifiers from certifying the design or construction work completed by a person in the same or a related company.

The Administrative Decisions Tribunal identified those problems in relation to an action for conflict of interest successfully brought by the Department of Infrastructure, Planning and Natural Resources in 2004. In that case the certifier had assisted to put together a development and construction proposal for the developer, and then certified the development. To better reflect the seriousness of that type of offence, the penalty for conflict of interest will be increased from a maximum of \$22,000 to \$33,000. Certifiers cannot participate in designing a building or development that they will later certify. To provide more certainty for certifiers and developers on the difference between design and compliance advice, the bill allows for circumstances to be prescribed in regulations as being or not being related to design. The Department of Infrastructure, Planning and Natural Resources will be consulting with industry and other stakeholders during the preparation of the regulations.

Certifiers make decisions that could seriously affect life and property. They decide whether a building is fit to occupy and assess the fire safety of buildings. Effective investigation powers are needed to ensure high standards of competence and professionalism within the certification industry. Where allegations are made of unprofessional conduct, including breaches of building code requirements, the board needs to obtain evidence to prove the breach and prevent the certifier from continuing to practice in that way. The board's investigation powers are dealt with in part 5 of the bill. It will have power to enter premises and obtain information in connection with an investigation.

The Department of Infrastructure, Planning and Natural Resources has had some difficulty in obtaining information from certifiers when a complaint is lodged. Sometimes the certifier may be the only person with the relevant information. The bill proposes that people under investigation will not be able to withhold information on the ground that the information may incriminate them. However, information obtained in this way will be inadmissible in criminal proceedings. I note that the privilege against self-incrimination has been waived in several other Acts, including the Protection of the Environment Operations Act 1997 and the Legal Professions Act 2004.

The board will be required to give an accredited certifier the opportunity to comment on any complaint allegation made against them to the board. In addition, the certifier will be given 28 days to comment on the board's investigation report should the board decide that the matter warrants investigation. The certifier may be invited or required to attend a meeting to consider the complaint. The current system of sanctions against private certifiers for unsatisfactory professional conduct is slow and cumbersome. This bill removes the need to obtain the certifier's consent to a sanction for unsatisfactory professional conduct. Without this consent, current accreditation bodies can only dismiss the complaint or go through the costly and time-consuming exercise of seeking a decision in the Administrative Decisions Tribunal.

In addition to the currently available sanctions—which include cautions, reprimands, placing conditions on accreditation, ordering the undertaking of specific education or reporting to the accreditation body—the board will be able to impose fines of up to \$11,000. This range of powers is consistent with similar professional licensing bodies such as the Board of Surveying and Spatial Information, the Home Building Service and the New South Wales Architects Registration Board. The power to immediately suspend the accreditation of a certifier was recommended by the Campbell inquiry in 2002. Through this bill the board will have emergency powers to suspend any accredited certifier if it considers this necessary to protect the property or safety of any person. The suspension must be followed by a full investigation into the matter, and the decision to suspend will be reviewable by the Administrative Decisions Tribunal.

Existing penalties that apply to accredited certifiers are retained. These include practising without holding the required insurance, acting beyond the scope of one's accreditation, accepting a bribe and making false representations in relation to the issue of certificates. The existing penalty for unauthorised issue of certificates

by an unaccredited person is also retained. The bill creates a new offence where an accredited certifier fails to notify the board of particular events, such as suspension of their accreditation in another jurisdiction. A private certifier's failure to notify their client of a change to their accreditation which will prevent them from executing their duties will also be an offence.

The bill removes the anomaly where actions for even minor matters must be taken in the Administrative Decisions Tribunal following an audit of a private certifier. Instead, the same disciplinary provisions will apply whether the investigation originated from an audit or a complaint and, where appropriate, the board can deal with the matter. Accreditation bodies are now unable to release specific details of accredited certifiers found guilty of unsatisfactory professional conduct. Under the bill, the board will be required to publicise disciplinary action against accredited certifiers. This power is in line with other jurisdictions, such as the Victorian Building Commission, which publishes disciplinary decisions in their industry bulletin.

The publication of disciplinary matters will send a strong message to certifiers and the building industry of the important role that certifiers hold as public authorities, who help to ensure public safety. It will help protect the public from unprofessional operators and educate other certifiers about the correct exercise of their regulatory functions. The Environmental Planning and Assessment Act will be amended by this bill to clarify that funds from the Planning Reform Fund can be used to partly fund the operations of the board. This will be in addition to the board's accreditation and other fees. The board will help to ensure that the strategic planning work, which the Planning Reform Fund is also directed at, is actually delivered on the ground. Development application fees will not be increased as a result of this proposal.

The Building Professionals Bill 2005 envisages a single, independent body—the Building Professionals Board—having the responsibility of promoting standards of competence and professionalism across the certification industry. The board will be well placed to work with government agencies, professional associations, the education sector and the development industry to promote higher building standards. The accreditation of council certifiers, which will be the subject of further legislation following consultation with local government, will extend these very important reforms to the local government sector. The community should have greater confidence in building quality and safety as a result of this bill. I commend the bill to the House.