



## NSW Legislative Council Hansard

### Building Professionals Bill

Extract from NSW Legislative Council Hansard and Papers Tuesday 15 November 2005.

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#### Second Reading

**The Hon. TONY KELLY** (Minister for Justice, Minister for Juvenile Justice, Minister for Emergency Services, Minister for Lands, and Minister for Rural Affairs) [8.55 p.m.]: I move:

That this bill be now read a second time.

I seek leave to have the second reading speech incorporated in *Hansard*.

#### Leave granted.

The reforms introduced by this bill will significantly improve our regulatory and administrative framework for certifiers and help ensure the safety and quality of building work in NSW.

#### [Campbell Inquiry]

Members of this house will remember the 2002 Campbell inquiry into the quality of buildings, conducted by a committee of this Parliament. The Campbell inquiry recommended increasing the Government's role in regulating builders and other practitioners in the building industry. The key concern of the inquiry was that the building regulatory system in NSW was complex, poorly co-ordinated, poorly understood and lacking in professional rigour.

The Building Professionals Bill 2005 addresses these concerns in relation to private certifiers who are responsible for checking the regulatory compliance of building and subdivision work. The bill builds on other Government initiatives in building regulation such as reforms to the regulation of home building.

The bill makes significant amendments to the Environmental Planning and Assessment Act to bring together and improve requirements for the accreditation and complaints investigation of private certifiers and the auditing of private certifiers and councils in their role as certifying authorities.

The accreditation of council certifiers, which will be the subject of further legislation following consultation with local government, will extend these reforms to local government.

#### [Introduction to bill]

This bill will establish the Building Professionals Board as an independent statutory body that will accredit, and investigate complaints against private certifiers, and audit certifiers and councils in their role as certifying authorities. The Board replaces four existing accreditation bodies - professional associations representing engineers, building surveyors, land surveyors, and town planners.

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.

The bill expands the sanctions available against private certifiers found guilty of unprofessional conduct. New emergency suspension powers will be introduced and tough conflicts 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.

#### [Consultation]

Since the introduction and debate of this bill in the Legislative Assembly, the Department of Planning has held a further two consultation sessions with key stakeholders to discuss the bill. These sessions were in addition to several workshops held while developing proposals to create the Board and its legislative and administrative framework. Private certifiers, local government, developer groups, and professional associations representing engineers, building surveyors, land surveyors, builders and planners have been involved in these consultations.

As a result of these consultations, I am pleased to say that there is broad industry and stakeholder support for the establishment of the Board.

#### [Outline of the bill]

I turn now to the provisions of the bill.

**[Accreditation]**

Part 2 of the bill deals with accreditation, which allows a certifier to practise.

The Building Professionals Board will accredit certifiers to issue certificates for developments under the Environmental Planning and Assessment Act and strata legislation. Accreditation will be based on the certifier's qualifications, skills, knowledge and experience. Different categories of accreditation will apply depending on the level of competence demonstrated by the certifier.

Accreditation will be granted for a year. The process of renewing accreditation will allow the Board to ensure that private certifiers have current professional indemnity insurance and are up to date with changes in the industry through the undertaking of ongoing professional training.

**[Accreditation scheme]**

The bill requires the Government to produce a single accreditation scheme that sets out the qualifications, skills and experience requirements for all accredited certifiers, as well as a code of conduct for certifiers and continuing professional development requirements. The scheme will replace the four existing accreditation schemes established by professional associations.

A draft scheme has been prepared in consultation with the professional associations. Certifiers, local government, unions and the Australia Building Codes Board have also been closely consulted on the drafting of the scheme. It is anticipated that the draft scheme will be exhibited for public comment shortly. The Department of Planning will also hold state-wide workshops on the draft accreditation scheme during the exhibition period.

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 certifiers to become familiar with the new legislative and accreditation requirements.

Any proposed changes to the scheme after it is made must be open to public comment unless the change is minor. The Minister for Planning will make the first scheme and any major amendments to it after considering public comments.

The creation of a single accreditation scheme is strongly supported by industry stakeholders and certifiers. Overlaps between existing schemes will be eliminated, as will the potential for certifiers to shop around for more lenient accreditation requirements.

At the same time, the draft accreditation scheme presently proposes to acknowledge that there are well-established and recognised systems for vetting technical competence in certain professional areas. For example, the draft scheme recognises registration on the National Professional Engineers Register as a pathway towards accreditation in relation to technical competence in engineering and registration on the National Building Professionals Register as a pathway to accreditation in relation to technical competence in building. The board is in the best position to assess the competence of an applicant's statutory certification functions, however, and will retain this responsibility.

**[Review of accreditation decisions]**

Any decision to prevent or limit someone from working in their chosen profession is a serious matter. For this reason, the bill allows applicants for accreditation to contest accreditation decisions of the Board in the Administrative Decisions Tribunal.

This will be in addition to the right to make submissions to the Board on any proposal to downgrade or condition their accreditation, and in some cases, suspend or cancel their accreditation.

**[Accreditation register]**

Public access to information on accredited certifiers will be significantly improved under this bill. The public will have free access to a register of all accredited certifiers maintained by the Board. The register will detail levels of accreditation and any conditions of accreditation for each certifier. The register will be web-based for ease of use and to maximise access.

**[Change of principal certifying authority]**

The Department has responded recently to industry concerns about the costs of an approval to change the principal certifying authority (PCA) for a development. Fees currently being charged by the Department in

relation to the accreditation scheme for building surveyors and allied professions have been reduced and a discount for bulk applications introduced. Fees for the transfer of the PCA by the Board will be addressed in the regulations made under the bill.

This bill will also move to overcome difficulties currently being experienced in transferring work within a company where a certifier seeks to take leave or is not otherwise available to complete contracted work, and when a certifier leaves a company, by introducing a fast-track system for changing the PCA by a process of notification if all parties agree to the change, as opposed to requiring the approval of the Board.

### **[Disciplinary matters]**

The bill provides for the Board to have three to eight members with expertise in areas such as the certification process, building and construction law, and consumer protection. The Board will be responsible to the Minister for Planning. It will be particularly focused on ensuring that complaints are investigated and that a robust audit program is in place. The complaints' investigation role, I am sure you will agree, is more appropriately exercised by Government than by professional associations who are currently required to discipline their peers and members.

The bill, nevertheless, enables the Board to utilise the services of specialist committees and/or relevant experts to assist in making decisions on disciplinary matters where that expertise is not available in house. The Government acknowledges the benefits to be gained in appropriately utilising the skills and experience of industry experts as was pointed out in submissions on the bill.

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 against private certifiers, and audit private certifiers and councils who act as certifying authorities. The power to audit councils in their certification role is a current power exercised by the Department of Planning. Under the bill this power will be transferred to the Building Professionals Board so that all accreditation, complaints investigation and auditing powers over certifiers and councils come under one administration.

Any person will be able to complain about the professional conduct of an accredited certifier.

The current system of sanctions against private certifiers for unsatisfactory professional conduct is in need of overhaul. It relies on obtaining the certifier's consent to a sanction for unsatisfactory professional conduct. Without this consent, the existing accreditation bodies can only dismiss the complaint or go through the costly and time-consuming exercise of seeking a disciplinary finding in the Administrative Decisions Tribunal.

Under this bill, a range of sanctions will be available to the Board if unsatisfactory professional conduct is proven, from

- cautions or reprimands for relatively minor matters
- placing conditions on accreditation, and
- ordering certifiers to report on their practice, to
- fines of up to \$11,000.

The Board will be able to impose these sanctions without the consent of the certifier.

This range of powers is consistent with those of similar professional licensing bodies such as the Board of Surveying and Spatial Information, the Home Building Service and the NSW Architects Registration Board.

More serious allegations of professional misconduct where a certifier's certificate of accreditation may need to be withdrawn or where larger fines are contemplated, for instance, will be referred to the Administrative Decisions Tribunal for decision.

The matters that constitute unsatisfactory professional conduct will be expanded from those now in the Environmental Planning and Assessment Act. The new grounds of unsatisfactory professional conduct are:

- 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

- failing to comply with an investigatory direction or requirement, without reasonable excuse
- wilfully misleading or obstructing the Board in the exercise of its investigative functions, and
- other improper or unethical conduct that indicates that a certifier is unfit to carry out 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.

On matters of professional misconduct, the Administrative Decisions Tribunal will have the full range of sanctions available to the Board with the addition of fines of up to \$110,000, ordering the accredited certifier to pay to the complainant compensation of up to \$20,000, and suspending or cancelling the certifier's accreditation.

### **[Emergency suspension power]**

A power to immediately suspend the accreditation of a certifier was recommended by the Campbell Inquiry in 2002. This bill will give the Board the power to suspend a certifier's accreditation without notice in emergency cases where this is considered 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.

Some concern has been expressed about this power, especially from private certifiers and the building industry, during consultation sessions with the Department of Planning. However, this is a common power in relation to licensed professionals - for instance builders - and is aimed at protecting the public. It is not a power that would be exercised lightly

or often and is, by its nature, intended for emergency cases, such as where a certifier repeatedly acts outside their area of competence and therefore poses a wide threat to safety and property.

Every profession - lawyers and doctors for instance - needs to be able to quickly respond to extreme cases where someone may be, whether wilfully or not, causing harm.

The bill provides ample safeguards in relation to the suspension power:

- The matter must be investigated as a complaint and the certifier can comment on the investigation report and its recommendations.
- Suspension is for a maximum period of eight weeks, unless extended by the Board and the complaint has not been finalised.
- The certifier's accreditation is revived after the suspension period.
- The certifier can seek a stay on the suspension decision, and the certifier can seek a review of the decision in the Administrative Decisions Tribunal.

Nevertheless, to further address the concerns of certifiers, the Department will look to clarify procedural issues around this power in the regulations to be made under the bill.

### **[Conflicts of interest]**

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.

To better reflect the seriousness of conflict of interest offences, the applicable penalty will be increased from a maximum of \$22,000 to \$33,000.

The Environmental Planning and Assessment Act already provides that certifiers cannot participate in the preparation of plans or specifications for a building or development that they will later certify. These provisions are for the public's protection. A certifier's independence is crucial to delivering an effective certification system. Private certifiers act as public officials. A certifier who purports to assess the compliance of their own design work with required standards is clearly undertaking self-certification.

To provide more certainty for certifiers and developers on what action constitutes design work, the bill allows for circumstances to be prescribed in regulations as being or not being related to 'design'. The Department of

Planning has already been consulting with industry stakeholders on the proposed wording of the regulation in distinguishing design and compliance advice.

#### **[Privilege against self-incrimination waived]**

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.

Given the life safety and property damage issues that certifiers can deal with, including deciding whether a building is fit to occupy and assessing the fire safety of buildings, effective investigation powers are critical to ensuring 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 practise in that way. The Department of Planning has, on occasion, had 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.

The privilege against self incrimination has been waived in several other Acts including the *Protection of the Environment Operations Act 1997*, the *Legal Professions Act 2004*, the *Fair Trading Act 1987*, and the *Game and Feral Animal Control Act 2002*.

#### **[Compensation for damage caused]**

The bill requires the Board to pay compensation for any damage caused by an authorised officer who enters premises but only where the inspection does not reveal a breach of the Building Professionals Act, the Environmental Planning and Assessment Act, regulations made under those Acts or of an environmental planning instrument.

Some concern has been expressed in the Legislative Assembly and to the Department over collateral damage caused by authorised officers conducting investigations, such as costs of the delay of projects where work is opened up. I can assure members that officers authorised to conduct investigations will take all steps to minimise damage caused.

The Department has also advised that it will take appropriate steps to record the state of building works before and after any such investigation, enabling appropriate compensation to be paid.

#### **[Opportunities for certifier's comments]**

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 where the Board decides that the matter warrants investigation. The certifier may also be invited to attend a meeting held by the Board to consider the complaint.

#### **[Offences]**

Under this bill, a number of existing offences in the EP&A Act will be transferred. The bill also 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 that will prevent them from carrying out their duties as a principal certifying authority 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 will be able to deal with the matter.

#### **[Publicising disciplinary decisions]**

Accreditation bodies are now unable to release specific details of accredited certifiers found guilty of unsatisfactory professional conduct. Under this bill, the Board will be required to publicise disciplinary action against accredited certifiers.

Some concern has been expressed during consultations on the bill that the publication of disciplinary action

before appeal rights to the Administrative Decisions Tribunal have been exhausted may damage a certifier's reputation unnecessarily.

The publication of disciplinary action is an accepted method of helping to protect the public from unprofessional operators and to enable consumers to make informed decisions. Accordingly, the publication of the Board's considered decisions as soon as possible is considered critical. It will also serve to educate other certifiers about the correct exercise of their regulatory functions.

The bill requires decisions that are quashed or varied on appeal or review to be publicised with as equal prominence as the original decision. Certifiers are also able to seek an urgent stay of the decision to publish when they apply to appeal a disciplinary decision of the Board. A stay would require the Board not to publish the decision while the stay is in force.

### **[Retrospective construction certificates]**

The bill will amend the Environmental Planning and Assessment Act by providing that construction certificates cannot be issued for building or subdivision work that has already commenced. Early this year, the Land and Environment Court decided that a construction certificate could be issued retrospectively, that is for building work that has already been undertaken. This amendment will clarify the role that construction certificates play in authorising the commencement of building work.

Concern has been expressed during consultation on this bill that the inability of a certifier to issue a construction certificate where work has already commenced means that an occupation certificate cannot be issued to authorise a person to legally occupy the building. This may result in the situation that a perfectly good building would not be able to be occupied. Accredited certifiers consulted on this issue have also pointed to a common situation of overzealous builders starting work without being in possession of the necessary paperwork that allows work to start. They are keen to allow the principal certifying authority to be able to issue a construction certificate in such cases and for them to manage their exposure to liability as they see appropriate.

The best way, however, to ensure a high standard of building work i.e. work that complies with Council's development standards and the standards contained in the Building Code of Australia is to obtain certification of the plans before work commences. The inability to obtain a construction certificate and, subsequently, an occupation certificate for unauthorised building work is also an effective deterrent to unauthorised work.

To deal with stakeholder concerns, however, I have asked the Department to monitor the impacts of the amending provision on small business and consumers.

### **[Regulations]**

This bill enables regulations to be made to deal with such matters as fees, conflicts of interest and insurance. Following stakeholder submissions about these issues, the Department has agreed not to commence the Act until stakeholders have been consulted on a draft regulation.

In particular, the Government is keen to receive submissions on such matters as the insurance provisions and conflicts of interest provisions to ensure they are effective and appropriate.

### **[Other matters]**

The Department of Planning will consult in the near future on a number of matters with a view to amending the Building Professionals Act next year. These matters include:

#### Accreditation of council officers

The Government is committed to accrediting council certifiers, so that all certifiers in NSW carry out their functions to the same levels of competency. The Department has already carried out extensive consultation on the details of this proposal, but intends to seek further submissions before a position is determined.

#### Corporate private certifying authorities

The bill proposes that only individuals and Councils can be appointed as the certifying authority for a development as is currently the case under the Environmental Planning and Assessment Act. However, the Department believes that a number of issues that have arisen during consultation on the bill could be resolved by enabling companies to be appointed as certifying authorities. These issues include being able to easily transfer work between certifiers for reasons of illness, annual leave or certifiers moving between firms, 'ownership' of the files a certifier is responsible for when he or she moves on from a company, and the insurance of certifiers for the work they carry out.

Any proposal to introduce corporate private certifying authorities requires careful consideration of accountability

issues. The company structure must not be used as a means to avoid individual responsibility and liability for the decisions of individual private certifiers. It is therefore proposed to consult private certifiers and other relevant stakeholders to develop details of the proposal.

#### Close relations between certifiers and builders/developers

The Department has also been asked to consider the issue of the proximity of relations between certifiers and those who employ their services. Since its inception, the private certification system has been criticised because of the underlying issue of certifiers regulating those who pay for their services. The Government has, in recent times, moved to overcome this issue by taking such steps as requiring the owner of the land to appoint the PCA, employing the services of additional Departmental investigators to audit private certifiers and investigate complaints and, through this bill, strengthening the conflicts of interest provisions.

However, where a significant proportion of a certifier's work is for a single client i.e. a single developer or building design consultant, there is potential for the integrity and objectivity of the certifier to be undermined. There is also the perception of a conflict of interest which arises from this situation.

The Department will soon consult private certifiers, the building industry and local government on ways to address these concerns.

#### **[Conclusion]**

The creation of the Building Professionals Board through the Building Professionals Bill 2005 will bring major improvements to the professionalism of the private certification industry. The Board will be well placed to work with government agencies and local government, professional associations, the education sector and the development industry to promote higher building standards. It will deliver tangible improvements for the public—better consumer information, increased public protection, better industry education and consistent standards of competence.

The creation of the Board will allow industry stakeholders to retain an involvement in ensuring the increased professionalism of the certification industry. The community should have greater confidence in building quality and safety as a result of this bill.

I commend the bill to the House.