

Building Legislation Amendment (Quality of Construction) Bill 2002

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 conduct of certifying authorities,
- (iv) construction certificates,
- (v) occupation certificates,
- (vi) conditions of development consents and complying development certificates,
- (vii) time for giving notice,
- (viii) fire safety statements,
- (ix) offences and penalties,
- (x) exclusion of personal liability,
- (xi) other miscellaneous matters,
- (xii) savings and transitional provisions,

and to make consequential amendments to the *Environmental Planning and Assessment (Savings and Transitional) Regulation 1998* and the *Local Government and Environmental Planning and Assessment Amendment (Transfer of Functions) Act 2001*, and

(b) to amend the *Home Building Act 1989* and the *Home Building Regulation 1997* with respect to the following matters:

- (i) financial solvency of building contractors,
- (ii) preliminary investigation of building disputes,
- (iii) use of independent experts in building claims,
- (iv) implied conditions of contracts to do residential building work,
- (v) other miscellaneous matters,
- (vi) savings and transitional provisions,

and to make consequential amendments to the *Home Building Legislation Amendment Act 2001* and the *Consumer, Trader and Tenancy Tribunal Act 2001*, and

(c) to amend the *Conveyancing (Sale of Land) Regulation 2000* so as to imply into agreements for the sale of land certain provisions restricting the right of the vendors of land to require completion of agreements for the sale of strata units “off the plan” and agreements for the sale of land in the nature of “house and land” packages (that is, combined or associated agreements for the sale of land and the erection of a dwelling-house on the land).

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 Schedule 1.1 [14] whose commencement is tied to the commencement of a provision of the *Land and Environment Court Amendment Act 2002*.

Clause 3 is a formal provision giving effect to a Schedule of amendments to the *Environmental Planning and Assessment Act 1979*, the *Environmental Planning and Assessment Regulation 2000*, the *Environmental Planning and Assessment (Savings and Transitional) Regulation 1998* and the *Local Government and Environmental Planning and Assessment Amendment (Transfer of Functions)*

Act 2001 (**Schedule 1**).

Clause 4 is a formal provision giving effect to a Schedule of amendments to the *Home Building Act 1989*, the *Home Building Regulation 1997*, the *Home Building Legislation Amendment Act 2001* and the *Consumer, Trader and Tenancy Tribunal Act 2001* (**Schedule 2**).

Clause 5 is a formal provision giving effect to an amendment to the *Conveyancing (Sale of Land) Regulation 2000* (**Schedule 3**).

Schedule 1 Amendment of environmental planning and assessment legislation

This Schedule amends the *Environmental Planning and Assessment Act 1979* (**the 1979 EP&A Act**), the *Environmental Planning and Assessment Regulation 2000* (**the 2000 EP&A Regulation**), the *Environmental Planning and Assessment (Savings and Transitional) Regulation 1998* (**the 1998 EP&A Regulation**) and the *Local Government and Environmental Planning and Assessment Amendment (Transfer of Functions) Act 2001* (**the 2001 LG&EP&A Amendment Act**).

Functions of certifying authorities

Schedule 1.1 [8], [9], [11] and [12] 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.

Schedule 1.1 [10] and [13] amend sections 81A and 86 of the 1979 EP&A Act to exempt Crown development from certain requirements of those sections.

Schedule 1.2 [3]–[6] and [8]–[11] make consequential amendments to clauses 103 and 135 of the 2000 EP&A Regulation.

Schedule 1.1 [16] 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 1.1 [17] inserts a new section 109E (3) into the 1979 EP&A Act to set out the functions of a principal certifying authority, which are to be as follows:

- (a) to ensure that a construction certificate is issued in relation to the work,
- (b) to ensure that each person by whom the work is carried out is the holder of the appropriate licence or permit, and is covered by the appropriate insurance, as required by the *Home Building Act 1989*,
- (c) to ensure that, while the work is being carried out, it is inspected on such occasions as are prescribed by the regulations,
- (d) to ensure that compliance certificates are 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,
- (e) to ensure that all requirements of the Act and the regulations that must be satisfied before an occupation certificate or subdivision certificate may be issued for the work have been satisfied,
- (f) to issue the relevant occupation certificate or subdivision certificate for the work,
- (g) to comply with such other requirements as may be prescribed by the regulations.

Schedule 1.2 [24] inserts a new clause 162A into the 2000 EP&A Regulation to specify the occasions on which building work is to be inspected, as referred to

in proposed section 109E (3) (c).

Schedule 1.1 [18] inserts a new section 109EA into the 1979 EP&A Act, replacing the existing section 109E (3) to be repealed by **Schedule 1.1 [17]**, to better identify by whom approval is required before a certifying authority or principal certifying authority for development can be replaced.

Schedule 1.2 [23] makes a consequential amendment to clause 162 of the 2000 EP&A Regulation.

Schedule 1.1 [27] amends section 109ZG 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.

Investigation of certifying authorities

Schedule 1.1 [31] 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 Planning (*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 1.1 [25] repeals section 109U of the 1979 EP&A Act as a consequence of proposed Division 1B, and **Schedule 1.1 [26]** makes a consequential amendment to section 109ZA of that Act.

Improper influence with respect to conduct of accredited certifiers

Schedule 1.1 [40] inserts a new section 148A into the 1979 EP&A Act. The new section makes it an offence, punishable by a fine of up to \$1.1 million or imprisonment for up to 2 years, or both, for an accredited certifier to accept a benefit from any person, or for a person to offer a benefit to an accredited certifier, on the understanding that the accredited certifier will act otherwise than impartially in the exercise of his or her functions as a certifying authority.

Construction certificates

Schedule 1.1 [6] 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 1.1 [7] 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 1.2 [17] and [18]** amend clause 147 of the 2000 EP&A Regulation to make this a requirement of a construction certificate.

Schedule 1.1 [29] makes a consequential amendment to section 116G of the 1979 EP&A Act.

Schedule 1.2 [17] 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 1.1 [19] inserts a new paragraph (b1) into section 109H (1) of the 1979 EP&A Act so as to ensure that an occupation certificate cannot be issued in respect of building work unless the principal certifying authority is satisfied that it has been carried out in accordance with any relevant development consent, complying development certificate and construction certificate.

Schedule 1.1 [21] 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 1.1 [22] amends section 109N of the 1979 EP&A Act so as to remove a minor ambiguity of expression.

Schedule 1.2 [21] 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.

Conditions of development consents and complying development certificates

Schedule 1.2 [2] and [14] 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 person in charge of the site, and prohibiting unauthorised entry to the site. Clauses 98B and 136C require the council to be given notice of the licence number or owner-builder permit number for the person carrying out the work, and the name of the insurer for the work, under the *Home Building Act 1989*.

Schedule 1.2 [1], [12] and [13] make consequential amendments to the 2000 EP&A Regulation.

Time for giving notice

Schedule 1.2 [7], [15], [16], [20] and [22] 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.

Fire safety statements

Schedule 1.2 [25] and [26] amend clauses 177 and 180 of the 2000 EP&A Regulation so as to create separate offences for each week by which a person fails to comply with the requirements of those clauses with respect to the giving of annual and supplementary fire safety statements to the council.

Schedule 1.2 [33] and [34] amend Schedule 5 to the 2000 EP&A Regulation so as to create separate penalty notice offences, with penalty amounts ranging from \$500 to \$2,000, for the separate offences created by the proposed amendments to clauses 177 and 180 of that Regulation.

Offences and penalties

Schedule 1.1 [33] amends section 125 of the 1979 EP&A Act so as to ensure that a requirement under that Act that must be complied with by a particular time, or within a particular period, continues after the time has expired or the period ended.

Schedule 1.1 [34] amends section 126 of the 1979 EP&A Act so as to make it clear that the regulations may set their own penalties, and consequently that not all offences against the regulations will attract the default penalty of 1,000 penalty units (\$110,000) that currently applies.

Schedule 1.1 [35] and [37] consequentially amend sections 127 and 127A of the 1979 EP&A Act so as to make it clear that proceedings for an offence may be taken, and penalty notices may be issued, in relation to offences created by the regulations under that Act.

Schedule 1.1 [36] amends section 127 of the 1979 EP&A Act so as to allow proceedings for all offences against the Act, but not offences against the regulations, to be brought up to 2 years after they are alleged to have been committed.

Schedule 1.1 [38] amends section 127A of the 1979 EP&A Act to allow the

penalties payable under penalty notices for the same offence to be for different amounts depending, for example, on when the offence was committed.

Schedule 1.1 [39] amends section 127A of the 1979 EP&A Act so as to allow the persons who are to be authorised officers for the purpose of issuing penalty notices to be prescribed by the regulations under that Act.

Schedule 1.2 [28] consequentially amends clause 284 of the 2000 EP&A Regulation to prescribed authorised persons for the purposes of section 127A of the 1979 EP&A Act.

Schedule 1.2 [27], [29] and [30] amend Schedule 5 to the 2000 EP&A Regulation by way of statute law revision by omitting obsolete provisions with respect to short descriptions to be used in penalty notices and other documents in relation to offences.

Schedule 1.2 [31] and [32] amend Schedule 5 to the 2000 EP&A Regulation so as to create a number of “penalty notice offences” for failures to comply with the requirements of certain orders under section 121B of the 1979 EP&A Act, and clauses 130, 138, 142, 151 and 160 of the 2000 EP&A Regulation in relation to the giving of notice in relation to complying development certificates, compliance certificates, construction certificates, occupation certificates and subdivision certificates.

Exclusion of personal liability

Schedule 1.1 [41] inserts proposed section 158 into the 1979 EP&A Act, which protects specified persons from personal liability for acts and omissions for which they are responsible while executing that Act. The persons specified include persons who are members of committees established under sections 20 and 22. In order to ensure that the exclusion of personal liability does not deprive an injured person of a person against whom to commence proceedings for the injury, **Schedule 1.1 [2] and [4]** provide that any such committee is to be a statutory body representing the Crown. The opportunity is taken to substitute the provision that sets out the functions of a committee established under section 22 (**Schedule 1.1 [3]**), so as to ensure that they include the functions exercised by all currently constituted committees.

Other miscellaneous matters

Schedule 1.1 [1] amends section 18 of the 1979 EP&A Act so as to remove references to provisions that no longer exist.

Schedule 1.1 [5] amends section 23 of the 1979 EP&A Act so as to extend the powers of the Director-General to delegate certain functions.

Schedule 1.1 [14] replaces references to a council in section 96AA of the 1979 EP&A Act with references to a consent authority, a correction by way of statute law revision.

Schedule 1.1 [15] 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 1.1 [20] amends section 109H of the 1979 EP&A Act so as to remove a minor ambiguity of expression.

Schedule 1.1 [23] 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 1.1 [24] amends section 109T of the 1979 EP&A Act so as to allow an accreditation body to rely on a certificate of currency issued by an insurance company when determining whether or not an accredited certifier is covered by the required insurance.

Schedule 1.1 [28] 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 1.1 [30] amends section 118A of the 1979 EP&A Act so as to ensure

that a principal certifying authority has a statutory right of entry to the land on which is being carried out any development for which he or she has been appointed as the principal certifying authority.

Schedule 1.1 [32] 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 1.2 [18] amends clause 147 of the 2000 EP&A Regulation so as to make it clear that different parts of the same building may have different building classifications.

Schedule 1.2 [19] 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 has 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.

Savings and transitional provisions

Schedule 1.1 [42] and [43] amend Schedule 6 to the 1979 EP&A Act so as to enact certain savings and transitional provisions consequent on the amendment of that Act by the proposed Act and so as to enable the regulations under that Act to enact further savings and transitional provisions.

Environmental Planning and Assessment (Savings and Transitional)

Regulation 1998

Schedule 1.3 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.

Local Government and Environmental Planning and Assessment

Amendment (Transfer of Functions) Act 2001

Schedule 1.4 amends the 2001 LG &EP&A Amendment Act so as to repeal provisions that are replicated by Schedule 1.1 [34], [36] and [37] of the proposed Act.

Schedule 2 Amendment of home building legislation

This Schedule amends the *Home Building Act 1989* (***the 1989 HB Act***), the *Home Building Regulation 1997* (***the 1997 HB Regulation***), the *Home Building Legislation Amendment Act 2001* (***the 2001 HB Amending Act***) and the *Consumer, Trader and Tenancy Tribunal Act 2001* (***the 2001 CTTT Act***).

Financial solvency of building contractors

Schedule 2.1 [2], [3] and [4] amend sections 20 and 40 of the 1989 HB Act so as to require the Director-General of the Department of Fair Trading (***the Director-General***) to reject an application for a licence, or for renewal or restoration of a licence, unless satisfied that the applicant meets appropriate standards of financial solvency, and that the Director-General's decision as to such standards is not reviewable by the Administrative Decisions Tribunal.

Preliminary investigation of building disputes

Schedule 2.1 [6] substitutes Division 2 of Part 3A of the 1989 HB Act so as to establish a new regime for the preliminary investigation of building disputes. Under the new regime, notification of a building dispute may give rise to an investigation by an inspector from the Department of Fair Trading (proposed section 48D), who may make an order requiring specified work to be done in order to rectify incomplete or defective work (proposed section 48E). Failure to comply with the requirements of a rectification order will constitute improper conduct for which disciplinary action may be taken against the contractor concerned (under amendments to section 51 by **Schedule 2.1 [13]**), but will not

give rise to any right of action by the complainant, and ceases to have effect if a building claim is made before the time within which the work required by the order must be done (proposed section 48F).

Schedule 2.1 [7] amends section 48I of the 1989 HB Act so as to provide for the withdrawal of building claims from the Consumer, Trader and Tenancy Tribunal, and ensures that the Tribunal has an opportunity to restore a rectification order (made under proposed section 48E) that ceased to have effect when the building claim was made.

Schedule 2.1 [8] substitutes section 48J of the 1989 HB Act to ensure that building claims do not have to be accepted by the Tribunal unless the Registrar of the Tribunal is satisfied that a building dispute has been investigated in accordance with the proposed Division 2 of Part 3A of that Act.

Schedule 2.1 [5], [9], [10] and [12] make consequential amendments to sections 48A and 48N of the 1989 HB Act.

Use of independent experts in building claims

Schedule 2.1 [11] amends section 48N of the 1989 HB Act so as to enable an independent expert to be appointed to assist the Consumer, Trader and Tenancy Tribunal to deal with a building claim. If such an expert is appointed, no other building expert may be called by the parties to the building claim except by leave of the Tribunal.

Implied conditions of contracts to do residential building work

Schedule 2.2 [2] inserts proposed Schedule 3A into the 1997 HB Regulation. The new Schedule prescribes conditions with respect to the plans and specifications for building work and kit homes (clauses 1 and 4), conditions with respect to quality of construction of building work and kit homes (clauses 2 and 5) and a condition holding back the final payment for building work until all requirements for the issuing of a final occupation certificate under Part 4A of the 1979 EP&A Act have been complied with.

Schedule 2.2 [1] makes a consequential amendment to the 1997 HB Regulation (proposed clause 59).

Other miscellaneous matters

Schedule 2.1 [14] amends section 54 of the 1989 HB Act so as to ensure that disciplinary action can be taken under Part 4 of that Act against individuals who are members of partnerships or officers of corporations. **Schedule 2.1 [1]** amends section 3 of the 1989 HB Act to insert a definition of *officer*.

Schedule 2.1 [15] amends section 62 of the 1989 HB Act so as to provide that cancellation of an authority, and disqualification from holding an authority, are separate actions that can be taken in relation to the holder of an authority who is found guilty of improper conduct.

Schedule 2.1 [16] makes a minor grammatical correction to section 126 of the 1989 HB Act.

Schedule 2.1 [17] amends section 138A of the 1989 HB Act so as to ensure that Department of Fair Trading investigators can issue penalty notices under that Act.

Savings and transitional provisions

Schedule 2.1 [18] and [19] amend Schedule 4 to the 1989 HB Act so as to enact certain savings and transitional provisions consequent on the amendment of that Act by the proposed Act and so as to enable the regulations under that Act to enact further savings and transitional provisions.

Home Building Legislation Amendment Act 2001

Schedule 2.3 amends the 2001 HB Amending Act by way of statute law revision so as to remove references in a savings provision to a non-existent provision of the 1989 HB Act.

Consumer, Trader and Tenancy Tribunal Act 2001

Schedule 2.4 amends section 28 of the 2001 CTTT Act so as to provide that the provisions of that section with respect to the withdrawal of applications to the Consumer, Trader and Tenancy Tribunal do not apply to certain building claims under the 1989 HB Act. This amendment is consequential on the proposed amendments to section 48I of the 1989 HB Act by **Schedule 2.1 [7]**.

Schedule 3 Amendment of conveyancing legislation

This Schedule amends Schedule 2 to the *Conveyancing (Sale of Land) Regulation 2000* so as to imply into agreements for the sale of land certain provisions restricting the right of the vendors of land to require completion of agreements for the sale of strata units “off the plan” and agreements for the sale of land in the nature of “house and land” packages (that is, combined or associated agreements for the sale of land and the erection of a dwelling-house on the land).