



New South Wales

Building and Development Certifiers Bill 2018

Explanatory note

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

Overview of Bill

The objects of this Bill are as follows:

- (a) to provide for the registration of persons to carry out certification work,
- (b) to place certain obligations on persons who are registered (*registered certifiers*) including with regard to indemnity and avoiding conflicts of interest,
- (c) to permit the Secretary of the Department of Finance, Services and Innovation (the *Secretary*) to take disciplinary action against registered certifiers,
- (d) to provide for the accreditation of persons to carry out regulated work,
- (e) to provide for the approval of certain bodies corporate as accreditation authorities to exercise accreditation functions with respect to those persons,
- (f) to provide for the authorisation of persons as authorised officers and to set out the functions of authorised officers,
- (g) to set out the functions of the Secretary under the proposed Act,
- (h) to repeal the *Building Professionals Act 2005*, the *Building Professionals Amendment Act 2008* and the *Building Professionals Regulation 2007*,
- (i) to amend the *Home Building Act 1989* to require consumers to be given information about the role of registered certifiers before entering certain contracts and to prevent consumers being unduly influenced in the selection of a registered certifier with respect to work carried out under those contracts,
- (j) to make consequential amendments to other Acts and instruments.

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 on a day or days to be appointed by proclamation.

Clause 3 sets out the objects of the proposed Act.

Clause 4 defines certain words and expressions used in the proposed Act including *certification work* which includes the exercise of a function of a certifier under the *Environmental Planning and Assessment Act 1979*, the determination of an application for a strata certificate under the *Strata Schemes Development Act 2015* and the inspection of swimming pools under the *Swimming Pools Act 1992*.

Part 2 Registration of certifiers

Division 1 Preliminary

Clause 5 creates offences (with a maximum penalty of \$110,000 in the case of a body corporate or \$33,000 in any other case) if a person (other than a local council) carries out certification work without a registration that authorises the person to carry out the work or if a person falsely represents that the person can carry out certification work or is registered or is registered in a particular class.

Clause 6 permits the Secretary to grant registration to a person to authorise the person to carry out certification work.

Clause 7 sets out the grounds for concluding that a person is not a suitable person to carry out certification work.

Division 2 Application for registration

Clause 8 sets out how an application for registration is made.

Clause 9 provides that the Secretary may require an applicant for registration or a close associate of an applicant to authorise other persons to provide the Secretary with information relevant to the investigation of the application. The Secretary may refuse to consider the application if the authorisation is not given.

Clause 10 provides that the Secretary may grant or refuse an application for registration. The grounds for refusing an application are that the application did not comply with a requirement of the proposed Act, the applicant is not a suitable person to carry out the certification work authorised by the registration or a ground prescribed by the regulations under the proposed Act.

Clause 11 provides that registration may be granted for 1, 3 or 5 years and that registration has no effect during any period during which it is suspended.

Clause 12 provides for the variation of registration by the Secretary.

Division 3 Conditions of registration

Clause 13 permits registration to be subject to conditions.

Clause 14 permits the conditions of registration to require the registered certifier to carry out certification work in accordance with specified standards or methodologies.

Clause 15 permits the conditions of registration to provide that the authorisation conferred by the registration will take effect in the future at a particular time or following a particular event (for example, the completion of a course of training).

Division 4 Suspension or cancellation of registration

Clause 16 sets out the grounds for suspending or cancelling registration which include (among other grounds) because the registered certifier is not a suitable person to carry out the certification work authorised by the registration or is not entitled to be registered or the Secretary has determined to suspend or cancel the registration under Part 4 (Disciplinary action against certifiers) of the proposed Act.

Clause 17 provides for the suspension of registration.

Clause 18 provides for the cancellation of registration.

Clause 19 permits the suspension or cancellation of registration to be subject to conditions.

Division 5 Miscellaneous

Clause 20 creates an offence (with a maximum penalty of \$33,000) if a registered certifier or former registered certifier contravenes a condition of registration or a condition of a suspension or cancellation of registration.

Clause 21 provides that registration is not transferable.

Clause 22 creates an offence (with a maximum penalty of \$66,000 in the case of a body corporate or \$33,000 in any other case) if a registered certifier lets out, hires or lends the certifier's certificate of registration to another person or permits another person to use the certificate. The Secretary is required to cancel the registration of a registered certifier who is convicted of the proposed offence.

Clause 23 permits a registered certifier to apply to the Secretary for a cancellation or suspension of the certifier's registration.

Clause 24 permits a person who is aggrieved by certain decisions of the Secretary under the proposed Part to apply to the Civil and Administrative Tribunal (the *Tribunal*) for an administrative review of the decision.

Clause 25 provides for the recovery of unpaid fees under proposed Part 2.

Part 3 Requirements on certifiers

Division 1 Insurance or other arrangement

Clause 26 creates offences (with a maximum penalty of \$110,000) if a registered certifier, who is not adequately insured with respect to certification work, carries out the certification work or holds out that the certifier is adequately insured. A registered certifier is adequately insured with respect to certification work if the registered certifier is indemnified by insurance against any liability that may result from carrying out the certification work or is part of some other arrangement approved by the regulations that provides indemnity against the liability.

Clause 27 permits regulations under the proposed Act to be made with respect to insurance or other arrangements under the proposed Division.

Division 2 Conflicts of interest

Clause 28 creates an offence (with a maximum penalty of \$33,000) if a registered certifier carries out certain certification work whilst having a conflict of interest in the certification work.

Clause 29 specifies when a registered certifier will have a conflict of interest in certification work—this occurs if a reasonable person would conclude that the registered certifier has a private interest with respect to the certification work that comes into conflict with, and may affect, the duty of the registered certifier to act in the public interest when undertaking the certification work. A number of examples are given as to when a registered certifier will have a private interest in certification work including if the registered certifier is a person who is obtaining the benefit of the certification work, has a pecuniary interest in the development or building to which the certification work relates, has worked on the construction or design of, or a development

application for, the development or building or is related to a person who has any of those private interests. The regulations under the proposed Act may also prescribe other circumstances in which a registered certifier will have a conflict of interest in certification work.

Clause 30 specifies when a registered certifier has a pecuniary interest in the subject of certification work. This occurs if there is a reasonable likelihood or expectation of appreciable financial gain or loss to the registered certifier, or to a person with whom the registered certifier has a relationship (whether family, personal, employment or business).

Division 3 General requirements

Clause 31 makes it a condition of registration that the registered certifier must not carry out certification work unless the work is carried out under a written contract.

Clause 32 permits regulations under the proposed Act to prescribe a code of conduct for registered certifiers.

Clause 33 creates an offence (with a maximum penalty of \$5,500) if a person appointed as the principal certifier with respect to development fails to give notice to the person who made the appointment of the person's registration being cancelled or suspended or being changed so that the person can no longer exercise the functions of a principal certifier.

Clause 34 creates an offence (with a maximum penalty of \$5,500) if a person, who carries out certification work in the course of the person's employment, fails to give notice to the person's employer of the person's registration being cancelled or suspended or being changed so that the person can no longer carry out the certification work.

Clause 35 creates an offence (with a maximum penalty of \$5,500) if a registered certifier fails to notify the Secretary of certain events that may affect the certifier's suitability to be registered. The clause also creates an offence (with a maximum penalty of \$1,100) if a registered certifier fails to notify the Secretary of any other change required to the particulars recorded in the register of registrations and approvals maintained by the Secretary.

Clause 36 creates an offence (with a maximum penalty of \$4,400 in the case of a body corporate or \$2,200 in any other case) if a person whose registration has been suspended, subjected to conditions or cancelled fails to return the person's certificate of registration to the Secretary when required to do so.

Clause 37 provides that an individual who is registered (a *registered individual*) who carries out certification work on behalf of a local council or a body corporate is subject to the same requirements as a person who carries out certification work on the person's own behalf.

Division 4 Additional requirements for registered body corporate

Clause 38 creates an offence (with a maximum penalty of \$33,000) if a *registered director* (being an individual who is registered and who is the director of a body corporate that is registered (a *registered body corporate*)) fails to ensure certain matters with respect to certification work carried out by or on behalf of the body corporate, including ensuring compliance with the proposed Act and ensuring that the work is carried out by a suitably registered individual.

Clause 39 creates an offence (with a maximum penalty of \$33,000) if a registered director of a registered body corporate fails to report conduct of the body corporate, another registered director of the body corporate or a registered individual who is carrying out certification work on behalf of the body corporate to the Secretary if the director suspects that the conduct is a ground for the Secretary to take disciplinary action against the person.

Clause 40 creates an offence (with a maximum penalty of \$110,000) if a registered body corporate fails to ensure that any certification work carried out on behalf of the body corporate is carried out by a registered individual whose registration authorises the individual to carry out that work.

Clause 41 creates an offence (with a maximum penalty of \$110,000) if a registered body corporate carries out certification work during any period during which it does not have at least

1 director who is a registered individual whose registration authorises the individual to carry out that work (a *suitably qualified director*). The clause also creates an offence (with a maximum penalty of \$110,000) if a registered body corporate (that has not had a suitably qualified director for a continuous period of 3 months) carries out certification work before it has a suitably qualified director and has notified the Secretary of that fact.

Division 5 Miscellaneous offences relating to certification work

Clause 42 creates an offence (with a maximum penalty of \$1,100,000 or imprisonment for 2 years, or both) if a registered certifier accepts, or agrees to accept, a benefit (a bribe) to carry out certification work other than impartially. The clause also includes an offence with the same maximum penalty for the person who gives, or offers to give, the benefit.

Clause 43 creates an offence (with a maximum penalty of \$33,000) if a person represents, for the purposes of securing work, that work other than certification work can be carried out only by a registered certifier.

Clause 44 creates an offence (with a maximum penalty of \$1,100,000 or imprisonment for 2 years, or both) if a registered certifier falsely issues certain certificates (including a complying development certificate or a strata certificate).

Part 4 Disciplinary action against certifiers

Clause 45 sets out the grounds on which the Secretary may take disciplinary action against a registered certifier.

Clause 46 provides that the proposed Part extends to certification work or certain other functions even if done on behalf of a registered body corporate or a local council.

Clause 47 requires the Secretary, before taking disciplinary action against a registered certifier, to give the registered certifier an opportunity to show cause why the disciplinary action should not be taken.

Clause 48 sets out the disciplinary action that the Secretary may take against a registered certifier. This includes cautioning or reprimanding the certifier, requiring the certifier to pay a penalty of up to \$220,000 (in the case of a body corporate) or \$110,000 (in the case of an individual), imposing a condition of the certifier's registration, suspending or cancelling the certifier's registration or disqualifying the certifier from being registered.

Clause 49 permits a person who is aggrieved by a decision of the Secretary to take disciplinary action to apply to the Tribunal for an administrative review of the decision.

Clause 50 provides for the enforcement of monetary penalties imposed on a registered certifier as disciplinary action by the Secretary.

Clause 51 provides that disciplinary action may be taken under the proposed Part regardless of whether the registered certifier concerned is subject to criminal or civil proceedings that relate to the same matters or incident and that the decision to take disciplinary action does not affect the liability of the registered certifier for any offence.

Part 5 Accreditation of persons carrying out regulated work

Clause 52 defines *regulated work* which means the carrying out of work as an accredited practitioner under the *Environmental Planning and Assessment Act 1979* or other work declared to be regulated work.

Clause 53 creates offences (with a maximum penalty of \$110,000 in the case of a body corporate or \$33,000 in any other case) if a person carries out regulated work without an accreditation that authorises the person to carry out that work or if a person falsely represents that the person can carry out regulated work or holds an accreditation or class of accreditation.

Clause 54 permits an accreditation authority to authorise a person to carry out regulated work by granting accreditation to the person.

Clause 55 permits the regulations under the proposed Act to authorise a registered certifier who is registered in a particular class to carry out specified regulated work in addition to persons who hold an accreditation.

Part 6 Approval of accreditation authorities

Division 1 Accreditation authorities

Clause 56 provides that an *accreditation authority* means a body corporate approved by the Secretary to exercise the functions of an accreditation authority and the *regulating accreditation authority* with respect to an accreditation is the accreditation authority that granted the accreditation. However, the Secretary can change the regulating accreditation authority with respect to an accreditation by written direction.

Clause 57 sets out the functions of an accreditation authority which are to accredit persons to carry out regulated work, to ensure that the holder of an accreditation (with respect to which the accreditation authority is the regulating accreditation authority) complies with the requirements of the accreditation and to investigate and exercise disciplinary functions with respect to any accreditation holder who fails to comply with those requirements.

Clause 58 creates offences (with a maximum penalty of \$110,000 in the case of a body corporate or \$33,000 in any other case) if a person improperly exercises a function of an accreditation authority or falsely represents that the person can grant an accreditation, grant an accreditation of a particular class or exercise any other function of an accreditation authority or if an accreditation authority falsely represents that an accreditation authorises the holder to carry out particular regulated work.

Clause 59 permits the Secretary to approve a company or an incorporated association to exercise the functions of an accreditation authority with respect to the accreditation of persons. The approval may be limited to a particular class of accreditation.

Clause 60 provides that an approved company or association may exercise accreditation authority functions in accordance with the proposed Act.

Clause 61 requires the Secretary to adopt accreditation authority approval guidelines with respect to the approval of bodies corporate as accreditation authorities.

Division 2 Approval procedure

Clause 62 sets out how an application for approval is made.

Clause 63 provides that the Secretary may grant or refuse an application for approval. The grounds for refusing an application are that the application did not comply with a requirement of the proposed Act, the Secretary is of the opinion that it is not in the public interest to approve the application or the applicant is not a suitable person to be approved as an accreditation authority, the applicant's proposed accreditation scheme (which is a document that sets out how the applicant proposes to exercise its functions as an accreditation authority) does not comply with the requirements of the proposed Act, the regulations made under that Act or the accreditation authority approval guidelines, the Secretary is not satisfied that the applicant has met all the requirements for the grant of an approval set out in the accreditation authority approval guidelines or any other ground that may be prescribed by the regulations under the proposed Act. On the grant of an approval the proposed accreditation scheme becomes the accreditation scheme of the accreditation authority.

Clause 64 provides that an approval may be granted for 1, 3 or 5 years and that an approval has no effect during any period during which it is suspended.

Clause 65 provides for the variation of an approval by the Secretary.

Division 3 Conditions of approval

Clause 66 permits an approval to be subject to conditions.

Clause 67 makes it a condition of an approval that the accreditation authority will exercise its functions only in accordance with its accreditation scheme.

Clause 68 makes it a condition of an approval that the functions of an accreditation authority will be exercised only by individuals who are notified to the Secretary.

Clause 69 makes it a condition of an approval that an accreditation authority must act in the public interest in the exercise of its functions.

Clause 70 makes it a condition of an approval that an accreditation authority must provide the Secretary with any information relating to the exercise of its functions as the Secretary may require. Failure to comply with this condition is an offence with a maximum penalty of \$5,500.

Clause 71 makes it a condition of an approval that an accreditation authority must engage an auditor (approved by the Secretary) to conduct an audit of the exercise of its functions if required to do so by the Secretary.

Clause 72 makes it a condition of an approval that an accreditation authority must provide reasonable assistance to the Secretary with respect to any investigation or audit of the accreditation authority by the Secretary.

Clause 73 makes it a condition of an approval that an accreditation authority must make available to the public any information relating to the exercise of its functions (including identifying information about the holders of accreditation) as may be specified by the Secretary. Failure to comply with this condition is an offence with a maximum penalty of \$11,000.

Clause 74 makes it a condition of an approval that an accreditation authority must keep the records prescribed by the regulations made under the proposed Act. Failure to comply with the condition is an offence with a maximum penalty of \$11,000.

Division 4 Suspension or cancellation of approval

Clause 75 sets out the grounds for suspending or cancelling an approval which include (among other grounds) because the Secretary is of the opinion that the accreditation authority has contravened a requirement imposed by or under the proposed Act, is not a suitable person to be approved to exercise the functions of an accreditation authority, should not have been granted an approval or is no longer exercising the functions of an accreditation authority.

Clause 76 provides for the suspension of an approval.

Clause 77 provides for the cancellation of an approval.

Clause 78 permits the suspension or cancellation of an approval to be subject to conditions.

Division 5 Miscellaneous

Clause 79 sets out what must be set out in an accreditation scheme and the matters for which an accreditation scheme must provide.

Clause 80 creates an offence (with a maximum penalty of \$220,000) if an accreditation authority or former accreditation authority contravenes a condition of its approval or a condition of a suspension or cancellation of its approval.

Clause 81 creates an offence (with a maximum penalty of \$110,000) if a person who holds an approval that is suspended purports to grant an accreditation.

Clause 82 permits an accreditation authority to apply to the Secretary for a cancellation of its approval.

Clause 83 permits a person who is aggrieved by certain decisions of the Secretary under the proposed Part to apply to the Tribunal for an administrative review of the decision.

Clause 84 authorises an accreditation authority to disclose to the Secretary any information obtained by the accreditation authority in the exercise of its functions.

Part 7 Powers of authorised officers

Division 1 Preliminary

Clause 85 sets out a number of definitions used in the proposed Part.

Clause 86 provides that an authorised officer may exercise functions conferred by the proposed Part for an *authorised purpose* (being to investigate, monitor and enforce compliance with the proposed Act, to obtain information or records for purposes connected with the administration of the proposed Act or to enforce, administer or execute the proposed Act).

Division 2 Authorised officers

Clause 87 permits the Secretary to appoint persons as authorised officers.

Clause 88 provides that a person's authorisation as an authorised officer may be subject to conditions, limitations or restrictions or be for limited purposes.

Clause 89 provides for authorised officers to be issued with identification cards and to produce identification cards when requested to do so.

Division 3 Information gathering powers

Clause 90 provides that any power conferred under the proposed Division may be exercised whether or not a power of entry is being exercised.

Clause 91 permits an authorised officer to direct a person to furnish information or records for an authorised purpose.

Clause 92 permits an authorised officer to direct a person whom the authorised officer suspects to have knowledge of matters with respect to which information is required for an authorised purpose to answer questions with respect to those matters.

Clause 93 permits an authorised officer to record questions and answers given under the proposed Division.

Division 4 Entry to premises

Clause 94 provides a power of entry to premises for authorised officers.

Clause 95 prevents an authorised officer from entering any part of premises used only for residential purposes without the permission of the occupier or the authority of a search warrant.

Clause 96 provides for the issuing of search warrants to authorised officers.

Clause 97 permits an authorised officer to direct the owner or occupier of premises or persons on those premises to provide reasonable assistance to the authorised officer.

Clause 98 sets out the powers that an authorised officer may exercise when on premises.

Division 5 Miscellaneous

Clause 99 permits the Secretary to retain records that an authorised officer has obtained under the proposed Part until the completion of proceedings in which they may be used as evidence. The person from whom the records are taken must be provided with a certified copy of the records.

Clause 100 creates an offence (with a maximum penalty of \$110,000 in the case of a body corporate or \$22,000 in any other case) if a person obstructs, hinders or interferes with an authorised officer.

Clause 101 creates an offence (with a maximum penalty of \$110,000 in the case of a body corporate or \$22,000 in any other case) if a person fails to comply with a direction of an authorised officer.

Part 8 Other functions of the Secretary

Clause 102 requires the Secretary to maintain a register of registrations and approvals issued under the proposed Act.

Clause 103 permits the Secretary to authorise publication of notices warning persons about dealing with a specified registered certifier, former registered certifier, accreditation authority or former accreditation authority or any other person that the Secretary reasonably believes may have breached the proposed Act or the regulations made under that Act.

Clause 104 permits the Secretary to accept a written undertaking from a registered certifier as to the manner in which the registered certifier will conduct the registered certifier's business as a registered certifier. Failure to comply with an undertaking is a ground for taking disciplinary action against the registered certifier.

Clause 105 permits the Secretary to apply to the Land and Environment Court for an injunction restraining an apprehended or actual contravention of the proposed Act or the regulations made under the Act.

Clause 106 permits the Secretary to investigate any registered certifier, former registered certifier, accreditation authority or former accreditation authority, the carrying out of certification work, the exercise of a function of an accreditation authority or any other matter that may constitute a breach of the proposed Act or the regulations made under that Act. The Secretary is also authorised to conduct an audit of a registered certifier or an accreditation authority at any time.

Clause 107 permits the Secretary to investigate the work and activities of a local council in its capacity as a certifier.

Clause 108 permits the Secretary to enter into an information sharing arrangement with certain agencies to share information with respect to the registration of certifiers, the regulation of certification work and insurance required to be held by registered certifiers (and the equivalent of those matters in other Australian jurisdictions).

Clause 109 permits the Secretary to direct insurers to provide information about insurance policies issued by the insurer to registered certifiers. Failure to comply with a direction is an offence (with a maximum penalty of \$55,000).

Clause 110 permits the Secretary to exercise the functions of an accreditation authority.

Part 9 Miscellaneous

Clause 111 creates an offence (with a maximum penalty of \$5,500) if a person discloses or uses certain information obtained in the administration of the proposed Act except in specified circumstances. The clause also creates an offence (with a maximum penalty of \$5,500) if a person influences the determination of a development application, the carrying out of certification work or the giving of a development control order under Division 9.3 of the *Environmental Planning and Assessment Act 1979*.

Clause 112 creates an offence (with a maximum penalty of \$110,000) if a local council fails to ensure that certain prescribed certification work is carried out on behalf of the local council only by a registered individual whose registration authorises the individual to carry out that certification work.

Clause 113 permits the Secretary to delegate the exercise of functions under the proposed Act.

Clause 114 protects persons exercising functions under the proposed Act from personal liability.

Clause 115 makes a director of a body corporate, or a person concerned in the management of a body corporate, liable for an offence under the proposed Act or regulations under the proposed Act that is committed by the body corporate if the director or person knowingly authorised or permitted the contravention.

Clause 116 provides for the means of service of documents under the proposed Act.

Clause 117 provides for the issuing and effect of evidentiary certificates by the Secretary as to matters relating to registered certifiers and registrations.

Clause 118 makes provision for the giving of penalty notices (on-the-spot fines) for offences against the proposed Act or the regulations made under the proposed Act.

Clause 119 provides for proceedings for offences against the proposed Act to be taken before the Local Court or before the Land and Environment Court in its summary jurisdiction and for proceedings for offences against the regulations to be taken before the Local Court.

Clause 120 permits regulations to be made under the proposed Act.

Clause 121 repeals the *Building Professionals Act 2005*, the *Building Professionals Amendment Act 2008* and the *Building Professionals Regulation 2007*.

Schedule 1 Savings, transitional and other provisions

Schedule 1 contains savings, transitional and other provisions consequent on the enactment of the proposed Act.

Schedule 2 Amendment of Home Building Act 1989 No 147

Schedule 2 [1] amends the *Home Building Act 1989* to insert proposed Division 1A of Part 2. The proposed Division imposes additional requirements with respect to certain contracts for residential building work or specialist work. The proposed Division makes it a requirement that the holder of a contractor licence must, before entering a contract with a person, provide to the person information about the role of registered certifiers. Failure to do so is an offence with a maximum penalty of \$4,400 in the case of a corporation and \$2,200 in any other case. The proposed Division also creates an offence (with a maximum penalty of \$110,000 in the case of a corporation and \$33,000 in any other case) if a holder of a contractor licence tries to unduly influence the appointment of a registered certifier with respect to work carried out under certain contracts. **Schedule 2 [1] and [4]** also include a compulsory term in certain contracts for work for which a registered certifier will be required, making it clear that the selection of a registered certifier is the sole responsibility of the person who engaged the building contractor and the contractor cannot object to the certifier who is selected. **Schedule 2 [3]** makes a consequential amendment. **Schedule 2 [2]** inserts a definition of *registered certifier*. **Schedule 2 [5]** includes savings and transitional provisions.

Schedule 3 Amendment of other Acts and instruments

Schedule 3 makes consequential amendments to the Acts and instruments specified in the Schedule other than **Schedule 3.3 [9] and [10]** which permit regulations under the *Environmental Planning and Assessment Act 1979* to prescribe circumstances in which the Secretary may appoint a principal certifier or prescribe classes of development in which the principal certifier is to be appointed in a manner prescribed by the regulations. **Schedule 3.3 [9] and [10]** also permit the regulations to require that a local council or other person must not refuse to accept the appointment.