

Explanatory note

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

This Bill is cognate with the *Environmental Planning and Assessment Amendment Bill 2008*.

Overview of Bill

The object of this Bill is to amend the *Building Professionals Act 2005* (**the Principal Act**):

(a) to require councils to ensure that certain certification work done on their behalf is undertaken by appropriately accredited certifiers under the Principal Act, and

(b) to facilitate the accreditation of persons undertaking certification work only on behalf of councils, and

(c) to introduce accreditation of building professionals who will be required to undertake certain design work under the *Environmental Planning and Assessment Act 1979*, and

(d) to enable bodies corporate to be accredited as accredited certifiers and to impose requirements on them in relation to the carrying out of certification work, and

(e) to introduce a number of requirements with respect to accredited certifiers aimed at preventing improper conduct, and

(f) to enable the Building Professionals Board (**the Board**) to impose the full range of sanctions currently only available to the Administrative Decisions Tribunal against an accredited certifier or building professional found guilty of unsatisfactory professional conduct or professional misconduct and to make other changes to the disciplinary proceedings provisions of the Principal Act.

Outline of provisions

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 is a formal provision that gives effect to the amendments to the *Building Professionals Act 2005* set out in Schedules 1 and 2.

Clause 4 provides for the repeal of the proposed Act after all the amendments made by the proposed Act have commenced. Once the amendments have commenced the proposed Act will be spent and section 30 of the *Interpretation Act 1987* provides that the repeal of an amending Act does not affect the amendments made by that Act.

Schedule 1 Principal Amendments

Certification work carried out by councils and accreditation of persons to carry out such work

Schedule 1 [2] inserts a definition of **certification work** to mean the issuing of complying development certificates and Part 4A certificates under the *Environmental Planning and Assessment Act 1979* and strata certificates under the strata legislation, the carrying out of the functions of a principal certifying authority under the *Environmental Planning and Assessment Act 1979* and the carrying out of certain inspections under that Act. Currently, certification work can be undertaken by accredited certifiers or by councils.

Schedule 1 [44] inserts proposed Part 6A into the Principal Act consisting of the following provisions:

Proposed section 74A requires a council to ensure that prescribed certification work done on behalf of a council is done by an appropriately qualified accredited certifier.

Proposed section 74B requires councils to provide such information to the Board, and keep such records, relating to the carrying out of their certification functions as are prescribed by the regulations.

Proposed section 74C enables the Board, with the approval of the Minister, to exempt a council from the requirements of the proposed Part and the duty under section 109E

(1AA) of the *Environmental Planning and Assessment Act 1979* of carrying out certification work.

Schedule 1 [5] and [7] amend section 5 of the Principal Act to provide that an application for accreditation to carry out certification work only on behalf of a particular council may not be made except on the recommendation of that council. The amendments also enable regulations to be made in relation to the making of recommendations.

Schedule 1 [8] inserts proposed section 5A into the Principal Act which provides, among other things, that the regulations may prescribe categories of accreditation in relation to persons carrying out certification work only on behalf of councils.

Schedule 1 [11] inserts proposed section 6A into the Principal Act to provide that the Board may not refuse an application to accredit a person to carry out certification work only on behalf of a council on the grounds of qualifications or not being a fit and proper person unless it has information that gives it reason to believe it should refuse the application on those grounds.

Schedule 1 [17] amends section 8 of the Principal Act to enable the Board to cancel a certificate of accreditation that is subject to a condition that the holder may carry out certification work only as the employee of a particular council if the holder ceases to be employed by the council or ceases to carry out certification work on behalf of the council.

Schedule 1 [38] amends section 66 of the Principal Act to ensure that a person does not commit an offence under that section by reason only of being employed or engaged by the council to do certain certification work.

Accreditation of building professionals and issue of design certificates

Proposed section 109IA is to be inserted into the *Environmental Planning and Assessment Act 1979* by the *Environmental Planning and Assessment Amendment Bill 2008* with which this Bill is cognate. That proposed section provides that a design certificate is to be obtained from a person appropriately accredited under the Principal Act before a Part 4A certificate can be issued in respect of an aspect of development, but only if the regulations under that Act so require.

Schedule 1 [8] inserts proposed section 5A into the Principal Act which, among other things, provides for a new class of accreditation for building professionals. It is intended that the new class of accreditation will include accreditation of appropriately qualified persons to issue design certificates.

Schedule 1 [3] amends section 4 of the Principal Act to enable the establishment of an accreditation scheme in relation to building professionals.

Schedule 1 [14] amends section 8 of the Principal Act as a consequence of the broadening of the accreditation under the Act to building professionals other than accredited certifiers.

Schedule 1 [42] substitutes section 72 of the Principal Act to extend the current offence in that section so that it prevents a building professional doing anything for which accreditation is required unless authorised by his or her certificate of accreditation.

Schedule 1 [45] inserts proposed section 84A into the Principal Act to include offences in relation to accredited building professionals (similar to the offences in section 84 in relation to accredited certifiers) prohibiting the offering to, or acceptance by, a building professional of benefits for acting in contravention of the *Environmental Planning and Assessment Act 1979* and the regulations under that Act in carrying out a building professional's functions.

Schedule 1 [46] amends section 85 of the Principal Act to make it an offence for a person to issue a design certificate under the *Environmental Planning and Assessment Act 1979* if the person is not authorised to issue such certificates, or make a false or misleading statement in connection with such a certificate.

Accreditation of bodies corporate

Currently, the Principal Act only provides for individuals to be accredited as accredited certifiers.

Schedule 1 [4] and [6] amend section 5 of the Principal Act to enable a body corporate to be accredited as an accredited certifier.

Schedule 1 [8] inserts proposed section 5A into the Principal Act to provide, among other things, that a certificate of corporate accreditation may be issued by the Board to a body corporate that has at least one director who is an accredited certifier and has as directors or employs at least two other persons who are accredited certifiers.

Schedule 1 [21] amends section 11 of the Principal Act to make a consequential amendment.

Schedule 1 [13] amends section 7 of the Principal Act to set out the circumstances in which the Board may refuse to issue or renew a certificate of corporate accreditation.

Schedule 1 [19] amends section 8 of the Principal Act to set out the circumstances in which the Board can suspend or cancel a certificate of corporate accreditation otherwise than where a complaint has been made.

Schedule 1 [37] amends section 61 of the Principal Act to require the holder of a certificate of corporate accreditation to notify the Board of certain matters.

Schedule 1 [39] amends section 66 of the Principal Act to provide for the way in which the offence currently contained in section 66 (1) (being an offence that prevents an accredited certifier issuing a Part 4A certificate or complying development certificate in certain circumstances) will apply to the issuing of such certificates by directors or employees of accredited bodies corporate.

Schedule 1 [42] inserts proposed sections 72A, 72B and 72C into the Principal Act. Proposed section 72A sets out the responsibilities of directors of an accredited body corporate who are accredited certifiers (**accredited certifier directors**). Those requirements include ensuring that the body corporate complies with the Principal Act in the carrying out of certification work and ensuring that certification work is undertaken by a director or employee who holds accreditation authorising the carrying out of the work.

Proposed section 72B makes it clear that an accredited certifier who is a director of or employed by an accredited body corporate, or employed by a council, to do certification work on its behalf is required to comply with the relevant laws applying to the carrying out of that work.

Proposed section 72C sets out certain requirements to be complied with by accredited bodies corporate, including ensuring that certification work undertaken on their behalf is undertaken by a director or employee who holds accreditation authorising the carrying out of the work.

Schedule 1 [48] inserts proposed section 93A into the Principal Act to provide that if a corporation contravenes a provision of the Principal Act or the regulations, a director of the corporation or a person concerned in the management of the corporation is also taken to have contravened the provision if he or she knowingly authorised or permitted the contravention.

Schedule 1 [9], [12], [15], [16] and [20] make consequential amendments.

Additional requirements with respect to accredited certifiers

Schedule 1 [18] amends section 8 of the Principal Act to enable the Board to suspend or cancel a certificate of individual accreditation if the Board is of the opinion that the holder is not a fit and proper person.

Schedule 1 [22] amends section 12 of the Principal Act to extend the circumstances in which the Board can take urgent action to suspend or place conditions on an accredited certifier's accreditation (and now a building professional's accreditation). The new circumstances are where the Board is satisfied that the accreditation holder concerned has persistently contravened the Principal Act, the *Environmental Planning and Assessment Act 1979*, the *Strata Schemes (Freehold Development) Act*

1973 or the *Strata Schemes (Leasehold Development) Act 1986*, or the regulations under those Acts, and is likely to continue to do so. **Schedule 1 [23]** substitutes section 15 of the Principal Act to allow the Board to extend the period of suspension without the need to obtain the approval of the President or Deputy President of the Board (as is currently required).

Schedule 1 [36] substitutes section 60 of the Principal Act to enable the Board, when it requires an accreditation holder to provide copies of documents or records, to require also that the accreditation holder is to verify those documents or records in a specified manner.

Schedule 1 [40] inserts proposed sections 66A and 66B into the Principal Act. Proposed section 66A makes it an offence for an accredited certifier to obtain income from certain certification work carried out for the same owner, principal contractor or person who engages the principal contractor if the income would exceed the limit prescribed by the regulations. The offence does not apply to income that an accredited certifier obtains when working on behalf of a council or as an employee of an accredited body corporate.

Proposed section 66B makes it an offence for an accredited certifier to issue more development certificates to the same owner, principal contractor or person who engages the principal contractor than the number prescribed by the regulations when carrying out certification work on behalf of a council or as an employee of an accredited body corporate.

Schedule 1 [41] inserts proposed Division 3A into Part 6 of the Principal Act containing proposed sections 71A–71C.

Proposed section 71A requires an accredited certifier to obtain the written approval of the Board before carrying out certification work in relation to development of a kind prescribed by the regulations if the person for whom the development is carried out, or the contractor or other person carrying out the development, is a prescribed person. A prescribed person is defined as a person included on a list kept by the Board under proposed section 71B.

Proposed section 71B enables the Board to keep a list of prescribed persons. A person may only be included in the list in accordance with the regulations. The proposed section also provides for the procedure to be followed by the Board when including a person on the list or removing a person from the list.

Proposed section 71C protects the State, the Board and certain others from claims for damages or other compensation in connection with the exercise of functions under the proposed Division.

Schedule 1 [43] inserts proposed section 73A into the Principal Act to enable the regulations to provide that a contract relating to the appointment of an accredited certifier must contain certain provisions or may not contain certain provisions.

Schedule 1 [47] amends section 85 of the Principal Act to make it an offence for a person to falsely represent that he or she holds accreditation that authorises the doing of something under the *Environmental Planning and Assessment Act 1979*, the *Strata Schemes (Freehold Development) Act 1973* or the *Strata Schemes (Leasehold Development) Act 1986* for which such accreditation is required.

Changes to disciplinary proceedings

Schedule 1 [28]–[30] amend section 31 of the Principal Act to remove the current requirement that the Board must refer a complaint to the Administrative Decisions Tribunal (*the Tribunal*) if satisfied that there is a reasonable likelihood that the accreditation holder concerned will be found guilty of professional misconduct. Instead, the Board will be able to deal with those matters itself or may refer any such complaint to the Tribunal. The Board will be able to impose the same range of sanctions for professional misconduct or unsatisfactory professional conduct as are available to the Tribunal. Those sanctions include suspension or cancellation of accreditation. Also, the amendments recast the current sanctions to reflect the

extension of the disciplinary provisions to accredited bodies corporate, accredited certifiers who are directors of accredited bodies corporate and building professionals. **Schedule 1 [31]** amends section 34 of the Principal Act to recast the current sanctions available to the Tribunal to reflect the extension of the disciplinary provisions to accredited bodies corporate, accredited certifiers who are directors of accredited bodies corporate and building professionals. **Schedule 1 [32]** substitutes section 36 of the Principal Act consequentially.

Schedule 1 [24] and [25] amend section 21 of the Principal Act to make it clear that the Board may decline to consider a complaint until any further particulars that it has required are supplied by the complainant. The amendments also provide that the Board may use its powers to obtain evidence at a preliminary stage of its dealing with a complaint.

Schedule 1 [26] substitutes section 22 of the Principal Act to enable the Board, at any time in dealing with a complaint, to decide to take no further action. If the Board makes such a decision, it must give the complainant and the accreditation holder concerned written reasons for its decision.

Schedule 1 [27] substitutes section 29 of the Principal Act to provide that when an authorised officer prepares a report into an investigation of a complaint against an accreditation holder, a copy of the report is not to be given to the Board to consider until the accreditation holder has had a chance to make submissions. Those submissions are to accompany the copy of the report given to the Board. At present, a copy of the report is given to the Board at the same time as it is given to the accreditation holder.

Schedule 1 [33] substitutes section 45 of the Principal Act to make it clear that the Board may investigate the activities of a council in its capacity as a certifying authority whether or not a complaint has been made. The amendments also enable the Board to take action, as if a complaint had been made, against an accreditation holder who, as a result of such an investigation, the Board thinks may be guilty of unsatisfactory professional conduct or professional misconduct.

Schedule 1 [34] amends section 46 of the Principal Act to enable the Board to investigate the work and activities of accredited certifiers when carrying out certification work on behalf of a council, accredited certifier directors of accredited bodies corporate and building professionals. Currently, the section only enables the Board to carry out investigations of certifying authorities.

Schedule 1 [35] amends sections 48, 49 and 57 of the Principal Act to make it clear that the investigation powers of the Board and its authorised officers extend to matters being dealt with in proceedings before the Tribunal on an application or referral under the Principal Act.

Miscellaneous amendments

Schedule 1 [1] and [2] amend section 3 of the Principal Act to include some new terms.

Schedule 1 [10] amends section 6 of the Principal Act to enable the Board to determine an application for accreditation after the Board has been taken to have refused the application because it was not dealt with in the specified time.

Schedule 1 [49] amends section 94 of the Principal Act to enable the regulations to provide for exemptions from all or any of the provisions of the Principal Act or the regulations.

Schedule 1 [50] amends section 94 of the Principal Act to enable the regulations to adopt a publication as in force from time to time and to create offences.

Schedule 1 [51] amends Schedule 2 to the Principal Act to enable savings and transitional regulations to be made for the purposes of the proposed Act.

Schedule 1 [52] amends Schedule 2 to the Principal Act to insert savings and transitional provisions consequent on the enactment of the proposed Act.

Schedule 2 Consequential amendments

Schedule 2 contains amendments to the Principal Act consequential on the amendments made by Schedule 1. Those amendments include changing references to accredited certifiers in certain provisions to accreditation holders to take account of the accreditation of building professionals. The amendments also include inserting a definition of ***unsatisfactory professional conduct*** that relates to building professionals.