

BUILDING AND CONSTRUCTION— NEW BODY TO OVERSEE BUILDING CERTIFICATION

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Currently, building certification is administered through any of the Institute of Engineers Australia, the Planning Institute of Australia, the Professional Surveyors Occupational Association or the Department of Infrastructure, Planning and Natural Resources. Frankly, it's a shambles.

The Building Professionals Act 2005 (the Act) was passed by the NSW upper house on 15 November 2005. When it commences, the Act will introduce wholesale changes in the regulation of those who provide building accreditation. The most significant change is the establishment of the Building Professionals Board. The Board is to be an independent statutory body that will take over the certification functions of the above. The Board will consist of between three to eight members appointed by the Minister for Planning and Natural Resources and will have its own administrative staff.

The establishment of the Board is a positive development. It will ensure consistent standards among building certifiers and provide one point of contact for the public on accreditation issues.

PAST, PRESENT AND FUTURE

The accreditation and regulation of building certifiers in NSW has been in a state of flux for a number of years. The collapse of HIH and newspaper exposés concerning poor workmanship,

conflicts of interest and questionable certifications, revealed serious deficiencies and lack of transparency in the building certification system. These problems spooked reinsurers of home warranty insurance providers. Insurers exited the market and premiums went through the roof. The home warranty insurance crunch began.

The NSW government responded with the 2002 Campbell inquiry, which found that the building regulatory system was complex, poorly coordinated, poorly understood and lacking in professional rigour. It eventually legislated on conflicts of interest and corrupt practices, imposing potential seven-figure penalties with prison sentences; however, many of the problems identified in the Campbell inquiry remained unaddressed.

When the Act commences operation, most of the current statute law regulating building certifiers will be transplanted from the Environmental Protection and Assessment Act 1979 (EP&A Act) to a dedicated statute, making the legislation more accessible and consolidating it with many new provisions.

ACCREDITATION, COMPLAINTS AND DISCIPLINE

Currently, each of the four existing bodies that administer building certification have their own and different processes in respect of accreditation and complaint handling. The Act establishes one consolidated complaints scheme and disciplinary process, both conducted by an independent board.

The Board is also to prepare an accreditation scheme and a code of conduct for certifiers. The

proposed scheme is to undergo a public consultation process and is likely to provide for the qualifications, skills, knowledge and experience required for accreditation under the proposed Act.

The Act sets out a clear procedure for the investigation of building certification issues by its officers who must produce a written report and recommendation. Such investigations may be instigated upon a complaint from the public or by the Board itself. That report is to be put to the subject certifier who will be entitled to make submissions in response within 28 days.

While investigating complaints, the Board has the power to suspend a certifier's licence for a period of up to eight weeks. That period can be extended with the approval of the President or Deputy President of the Board.

The Act provides for two categories of adverse finding. The more serious is professional misconduct, being conduct that is unsatisfactory professional conduct of a sufficiently serious nature to justify suspension or cancellation of the certifier's certificate of accreditation. If, upon considering the investigation report, the Board is satisfied there is a reasonable likelihood of a finding of professional misconduct, the Board will be required to apply to the Administrative Decisions Tribunal (ADT) for a disciplinary finding.

The lesser adverse finding is unsatisfactory professional conduct. Examples of unsatisfactory professional conduct include:

- conduct falling short of the standard of competence, diligence and integrity that a member of the public is entitled to expect of a reasonably competent accredited adviser;

- a contravention of the EP&A Act;
- a contravention of a law that relates to an accredited certifier, or that involves fraud or dishonesty;
- the wilful disregard of matters to which the certifier is required to have regard in exercising certifying functions;
- improper or unethical conduct; and
- breach of a term or condition of the certificate of accreditation or applicable code of conduct (upon such a code being developed).

Where unsatisfactory professional conduct is shown, the Board may impose certain actions or apply to the ADT for a disciplinary finding against the certifier. The punishments the Board can impose range from a caution or reprimand through to an \$11,000 fine. Other sanctions available include requiring the certifier to complete educational courses or to report on their practice in the manner and to the person specified by the Board.

The orders that the ADT will be able to make upon a finding of professional misconduct include all of those available to the Board. In addition, the ADT can order suspensions and cancellations of certificates of accreditation, with the ability to order that the certifier cannot reapply for a certificate for a specified period. A certifier the subject of adverse orders made by the ADT also faces the possibility that they will incur an adverse costs order—that is, the certifier may be required to pay the legal costs incurred by the Board in its prosecution.

Almost all disciplinary action taken by the Board or the ADT is to be publicised by the Board in such manner as the Board thinks fit. The Board is also to

keep a register of all disciplinary action by it or the ADT, which will be available to members of the public to search.

REGULATION OF LOCAL COUNCILS

The Board is to have the power to investigate local councils in the exercise of their capacity as certifying authorities; however, the accreditation of council certifiers has been put on hold. There are concerns that raising the bar for council certifiers, without first putting sufficient resources in place, would bring the approvals process to a halt, particularly in more remote areas.

The Board's report on investigations of council certifications is to be sent to the Director General of the Department of Local Government and to the council involved. Within 40 days of receiving the report, the council must provide the Director General of the Department of Local Government and the Board with written notice of the things done or proposed to be done to give effect to any recommendations contained in the report. The Board's revised report, upon considering any submissions by the Director General or the local council, is to be made publicly available.

CONCLUSION

The Act consolidates existing law with the new. Practically all of the law in relation to the regulation of builder certifiers will be housed in the one dedicated document. Naturally, this makes the legislation and regulation much more accessible.

This consolidation goes beyond the location of the legislation. It extends to the regulation of building certifications as a whole. This stands to simplify, clarify and improve transparency within the building certification industry. When combined with the code of

conduct, the accreditation system and heavy penalties for corrupt practices and conflicts of interest, there is the potential for a world-class building certification system, better quality buildings, and cheaper, more accessible insurance.

COMMENCEMENT

All this begs the question: 'when does it commence?' The new regime was originally intended to commence on 1 July 2005. However, it was blocked by opposition and minor parties and referred to a Parliamentary Review. That Review resulted in the Department of Planning preparing draft regulations clarifying certain conflict of interest and insurance provisions of the Act.

The Act is unlikely to commence operation before the Regulations are finalised, which is unlikely to occur before the end of February 2006.

In a further development, the NSW government has signalled that a process will be developed to permit corporations to be appointed as certifying authorities with a view to addressing stakeholder concerns about:

- onerous professional indemnity insurance requirements; and
- difficulties encountered when a given private certifier intends to retire or cannot complete all of the certifications required on a project in respect of which they have been appointed.

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