



New South Wales

# Building Professionals Act 2005 No 115

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New South Wales

## **Building Professionals Act 2005 No 115**

Act No 115, 2005

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An Act to establish the Building Professionals Board; to provide for the accreditation of certifiers for the purposes of the *Environmental Planning and Assessment Act 1979*; to provide for the regulation of accredited certifiers, the making of complaints against accredited certifiers and the investigation of certifying authorities; to amend the *Environmental Planning and Assessment Act 1979* and other Acts consequentially; and for other purposes. [Assented to 7 December 2005]

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The Legislature of New South Wales enacts:

## Part 1 Preliminary

### 1 Name of Act

This Act is the *Building Professionals Act 2005*.

### 2 Commencement

- (1) This Act commences on a day or days to be appointed by proclamation, except as provided by subsection (2).
- (2) Schedule 3.1 and 3.5 commence on the commencement of section 57 or the commencement of Division 4 of Part 5 of the *Law Enforcement (Powers and Responsibilities) Act 2002*, whichever is the later.
- (3) Different days may be appointed for the commencement of a single provision of Schedule 3 for the purpose of commencing the repeals or amendments effected by the provision on different days.

### 3 Definitions

- (1) In this Act:
  - accreditation scheme** means an accreditation scheme in force for the time being under Division 1 of Part 2.
  - accredited certifier** means the holder of a certificate of accreditation.
  - authorised officer** means a member of staff of the Board who is authorised by the Board to carry out investigations under Part 3 or 4.
  - Board** means the Building Professionals Board constituted under section 75.
  - certificate of accreditation** means a certificate of accreditation as an accredited certifier issued under this Act and in force.
  - Director** means the Director of the Board.
  - equivalent authorisation** means a certificate, accreditation, registration or other authorisation or qualification that is issued or conferred under the laws of another jurisdiction and that enables the holder to undertake similar functions to the holder of a certificate of accreditation.
  - exercise** a function includes perform a duty.
  - function** includes a power, authority or duty.
  - Register** means the Register kept under section 11.
  - Tribunal** means the Administrative Decisions Tribunal.
- (2) Notes included in this Act do not form part of this Act.

- (3) Words and expressions used in this Act (but not defined in this section) have the same meanings as they have in the *Environmental Planning and Assessment Act 1979*.



## **Part 2 Accreditation of certifiers**

### **Division 1 Accreditation scheme**

#### **4 Accreditation scheme**

- (1) The Board is to prepare an accreditation scheme for the purposes of this Act.
- (2) An accreditation scheme may make provision for or with respect to the following matters:
  - (a) the qualifications, skills, knowledge and experience required for accreditation under this Act,
  - (b) a code of conduct for accredited certifiers,
  - (c) continuing professional development requirements for accredited certifiers,
  - (d) such other matters as may be prescribed by the regulations.
- (3) An accreditation scheme has no effect unless it is adopted by the Minister.
- (4) The procedure for the adoption of an accreditation scheme is as follows:
  - (a) the proposed scheme is to be prepared in draft form by the Board and may be revised by the Minister,
  - (b) the proposed scheme is to be publicly exhibited for a period of at least 28 days,
  - (c) the Minister is to seek public comment on the proposed scheme during the period of public exhibition and public comment may be made during that period,
  - (d) the Minister is to have regard to any public comment received during the period allowed for public comment and may adopt the proposed scheme as exhibited or may revise the scheme before adopting it,
  - (e) the Minister is to adopt the scheme by publishing it in the Gazette.
- (5) The Minister is to make the accreditation scheme publicly available.
- (6) The Board:
  - (a) is to keep the accreditation scheme under review, and
  - (b) is to have regard to any public submissions made on the scheme from time to time, and
  - (c) may make recommendations to the Minister for the amendment or replacement of the scheme.

- (7) The Minister may amend or replace the accreditation scheme.
- (8) A reference in this section to the accreditation scheme includes a reference to an amendment of the scheme or the replacement of the scheme.
- (9) However, the provisions of subsection (4) (a)–(d) do not apply to an amendment of the accreditation scheme if the Minister is of the opinion that the amendment:
  - (a) is minor in nature or for the purpose of correcting an error, or
  - (b) is necessary to reflect a change of a course (including a continuing professional development course) or qualification or of the provider of a course or qualification.
- (10) Sections 40 and 41 of the *Interpretation Act 1987* apply to an accreditation scheme adopted by the Minister under this section in the same way as they apply to statutory rules within the meaning of that Act.

## **Division 2 Accreditation of accredited certifiers**

### **5 Applications for accreditation**

- (1) A person (other than a body corporate) may apply to the Board for a certificate of accreditation or the renewal of a certificate of accreditation.
- (2) An application must:
  - (a) be made in a form approved by the Board, and
  - (b) be accompanied by the application fee prescribed by the regulations, and
  - (c) be accompanied by such documents and information as the Board requires to determine the application.
- (3) If the Board considers it necessary to do so in order to determine the application, the Board may require any or all of the following:
  - (a) further documents or information to be provided by the applicant,
  - (b) that the applicant attend an interview, undertake an oral or written examination or provide a demonstration of the applicant's skills.

### **6 Determination of application for accreditation**

- (1) The Board may:
  - (a) issue or renew a certificate of accreditation, unconditionally or subject to conditions, or

- (b) refuse to issue or renew a certificate of accreditation in accordance with section 7.
- (2) If the regulations provide that different categories of certificate of accreditation may be issued by the Board, the Board may:
  - (a) in the case of an application for the issue of a certificate of accreditation, issue a certificate of a category prescribed by the regulations that the Board considers appropriate (regardless of whether the applicant has applied for a different category of certificate), or
  - (b) in the case of an application for the renewal of a certificate of accreditation, refuse to renew the certificate and instead issue a certificate of a different category to that to which the application for renewal relates if the Board considers it appropriate to do so.
- (3) If the Board decides to issue or renew a certificate of accreditation, it must issue a certificate to the applicant in a form determined by the Board that sets out the conditions to which the accreditation is subject.
- (4) The Board must give notice in writing to the applicant concerned of its intention to make any of the following decisions setting out the reasons for the decision:
  - (a) to refuse an application for the renewal of a certificate of accreditation,
  - (b) to refuse to renew a certificate of accreditation and instead to issue a certificate of a different category to that to which the application for renewal related,
  - (c) to impose new conditions on, or alter existing conditions of, a certificate of accreditation (other than conditions prescribed by the regulations).
- (5) The notice must include a statement that the applicant concerned may make submissions to the Board in relation to the proposed decision within 14 days after the date of the notice.
- (6) The Board must take into account any submissions received in accordance with subsection (5).
- (7) The Board must notify the applicant concerned in writing of the making of a decision under this section setting out the reasons for the decision.
- (8) The Board is taken to have refused to issue a certificate of accreditation if it has failed to make a decision within the period of 60 days after receiving the relevant application (or such longer period as is agreed to in writing by the applicant).

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**7 Grounds for refusal of accreditation**

- (1) The Board may refuse to issue or renew a certificate of accreditation:
- (a) if the applicant does not comply with a requirement under section 5 (3), or
  - (b) if the Board is not satisfied that the applicant has the qualifications, skills, knowledge and experience required by the accreditation scheme for accreditation as an accredited certifier, or
  - (c) if the Board is not satisfied that the applicant is covered by the insurance required by Division 2 of Part 6 or can obtain such insurance, or
  - (d) if the Board is not satisfied that the applicant is a fit and proper person, or
  - (e) if the applicant is a mentally incapacitated person, or
  - (f) if the applicant's equivalent authorisation has been suspended or cancelled (otherwise than at the applicant's request) under the law of another jurisdiction, or
  - (g) if the applicant has contravened a law (whether or not a New South Wales law, and whether or not the contravention is an offence) that relates to the functions or obligations of a person as an accredited certifier or the holder of an equivalent authorisation or involves fraud or dishonesty, or
  - (h) if the applicant has failed to comply with a statutory or other duty, or a contractual obligation, imposed on the applicant by or in accordance with a law (whether or not a New South Wales law) that relates to the functions or obligations of a person as an accredited certifier or the holder of an equivalent authorisation, or
  - (i) if the applicant is an undischarged bankrupt, or
  - (j) if the applicant has represented himself or herself as being an accredited certifier when the applicant was not an accredited certifier, or
  - (k) if the applicant has contravened any code of conduct in the accreditation scheme, or
  - (l) for such other reasons as may be prescribed by the regulations.
- (2) In addition to the grounds referred to in subsection (1), the Board may refuse to renew a certificate of accreditation if:
- (a) the Board is not satisfied that the applicant has undertaken the necessary continuing professional development required by the accreditation scheme since the applicant was last issued with a

- certificate of accreditation or renewal of a certificate of accreditation, or
- (b) the applicant has not provided evidence, if required by the Board, that demonstrates the applicant's compliance with any condition of the applicant's current certificate of accreditation, or
  - (c) the application is not accompanied by any records specified by the Board and required to be kept by the accredited certifier under Division 1 of Part 6.
- (3) The Board must refuse to issue or renew a certificate of accreditation if directed to do so by an order made by the Tribunal under this Act.

#### **8 Suspension or cancellation of accreditation**

- (1) The Board may cancel a person's certificate of accreditation as an accredited certifier if:
- (a) the person dies, or
  - (b) the person makes a written request to the Board for the cancellation of that person's certificate of accreditation, or
  - (c) the Board has made an error in issuing the certificate.
- (2) The Board may suspend or cancel a person's certificate of accreditation as an accredited certifier if:
- (a) the person has been issued a certificate of accreditation on the basis of a misrepresentation made by the person, whether or not made knowingly, or
  - (b) the Board is satisfied that the person is not covered by the insurance required by Division 2 of Part 6, or
  - (c) the person is a mentally incapacitated person, or
  - (d) the person's equivalent authorisation has been suspended or cancelled (otherwise than at the person's request) under the law of another jurisdiction, or
  - (e) the person is an undischarged bankrupt, or
  - (f) the person has failed to comply with an order of the Board under section 31.
- (3) The Board must suspend or cancel a certificate of accreditation if directed to do so by an order made by the Tribunal under this Act.
- (4) The Board may suspend or cancel a certificate of accreditation under subsection (2) (c)–(f) only after having given the holder of the certificate written notice of its intention to suspend or cancel the certificate setting out its reasons.

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- (5) The notice must include a statement that the holder of the certificate concerned may make submissions to the Board in relation to the proposed suspension or cancellation within 14 days after the date of the notice.
  - (6) The Board must take into account any submissions received in accordance with subsection (5).
  - (7) The suspension or cancellation of a certificate of accreditation:
    - (a) must be made by notice in writing, and
    - (b) must be served on the holder of the certificate, and
    - (c) takes effect on the day on which the notice is served or on a later day specified in the notice.

## **9 Conditions of accreditation**

- (1) A certificate of accreditation is subject to any conditions imposed by the Board under section 6 or this section and any conditions prescribed by the regulations.
- (2) The Board may, at any time, vary any term of, or condition imposed by the Board on, a certificate of accreditation or may impose a new condition on a certificate of accreditation.
- (3) The Board may vary a term or condition of a certificate of accreditation or impose a new condition only after having given the holder of the certificate of accreditation written notice of its intention to vary or impose the term or condition setting out its reasons.
- (4) The notice must include a statement that the holder of the certificate of accreditation concerned may make submissions to the Board in relation to the proposed variation or imposition of the term or condition within 14 days after the date of the notice.
- (5) The Board must take into account any submissions received in accordance with subsection (4).
- (6) Subsections (3)–(5) do not apply to the variation or imposition of a term or condition at the request of the holder of the certificate of accreditation concerned or following a decision of the Board under section 31 or the Tribunal under section 34.
- (7) A variation of a term or condition of, or imposition of a condition on, a certificate of accreditation:
  - (a) must be made by notice in writing, and
  - (b) must be served on the holder of the certificate, and
  - (c) takes effect on the day on which the notice is served or on a later day specified in the notice.

- (8) If the Board varies a term or condition of a certificate of accreditation or imposes a new condition, it is, as soon as is practicable, to issue the holder of the certificate with a replacement certificate that takes account of the variation or imposition of the term or condition.
- (9) Subsections (2)–(8) do not apply to a condition that is prescribed by the regulations.

**10 Duration of accreditation**

- (1) A certificate of accreditation has effect for a period of one year from the date on which it was issued or last renewed, except during any period of suspension or unless sooner cancelled.
- (2) Despite subsection (1), if an application for renewal of a certificate of accreditation has been made in accordance with the regulations but the application is not finally determined by the Board before the expiry of the certificate of accreditation, the certificate of accreditation (if not suspended or sooner cancelled) continues in force until the application is finally determined.

**11 Register**

- (1) The Board must cause a register to be kept in relation to all accredited certifiers (the *Register*).
- (2) The Register must contain the following particulars for each person who is, or has at any time been, an accredited certifier:
  - (a) the person's name and the address of the person's place of business,
  - (b) a telephone number or telephone numbers and, where available, an e-mail address for contacting the person for business purposes,
  - (c) the category of certificate of accreditation that is or was issued to the person,
  - (d) the name of the accreditation body (if relevant) by which the person was originally accredited,
  - (e) the date on which the person was first issued with a certificate of accreditation, and the date of each occasion on which the person's certificate of accreditation has been renewed,
  - (f) in a case where the person was accredited under the *Environmental Planning and Assessment Act 1979* before the commencement of this section, the periods during which the person was accredited under that Act,
  - (g) the name of the insurer with whom the person is currently covered by insurance for the purposes of Division 2 of Part 6, the identifying number of the insurance contract and the dates

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- between which the indemnity provided by the insurance contract has effect,
- (h) the terms of any conditions to which the person's accreditation is or has been subject, and the dates between which any such condition has or has had effect,
  - (i) in the case of a person whose certificate of accreditation is or has been suspended, the dates between which the suspension has or has had effect,
  - (j) in the case of an accredited certifier whose certificate of accreditation has been cancelled or has otherwise ceased to have effect, the date on which the accreditation was cancelled or ceased to have effect, as the case requires,
  - (k) such other particulars as are prescribed by the regulations.
- (3) Subsection (2) does not require the Board to include information about persons previously accredited under the *Environmental Planning and Assessment Act 1979* if the information is not available to the Board.
- (4) The Board is to ensure that the Register is made available to the public, free of charge, at the Board's offices during ordinary office hours and in any other manner that the Board directs.

### **Division 3 Powers of the Board for the protection of the public**

#### **12 Suspension of accreditation or imposition of conditions to protect the public**

- (1) The Board may take any of the following actions if satisfied that the taking of the action is necessary to protect the safety or property of any person:
- (a) by order suspend the certificate of accreditation of an accredited certifier for such period (not exceeding 8 weeks) as is specified in the order,
  - (b) by order impose on a certificate of accreditation such conditions as the Board considers appropriate.
- (2) The Board may take such action:
- (a) whether or not a complaint has been made to the Board about the accredited certifier, and
  - (b) whether or not proceedings in respect of such a complaint are before the Board or the Tribunal, and
  - (c) without first giving the accredited certifier concerned an opportunity to make submissions.



- (3) If the Board suspends a certificate of accreditation or imposes a condition on a certificate of accreditation under this section:
- (a) the Board is to notify the holder of the certificate of accreditation in writing, and
  - (b) the suspension or condition takes effect on a date specified in the notification, being a date occurring on or after service of the notification on the holder.

**13 Power to remove or alter conditions**

The Board may at any time:

- (a) alter or remove conditions imposed by an order under this Division, or
- (b) change the period for which an order under this Division has effect (subject to section 15), or
- (c) revoke an order under this Division.

**14 Matter to be treated as complaint**

If the Board takes action under section 12 in relation to a matter that is not already the subject of a complaint, the Board is to deal with the matter as a complaint and accordingly the provisions of Part 3 apply as if the matter were a complaint.

**15 Extension of suspension**

A period of suspension imposed by the Board under this Division may be extended, from time to time, by the Board by order for a further period or further periods, each of not more than 8 weeks, but only if:

- (a) the extension has been approved in writing by the President or Deputy President of the Board, and
- (b) the complaint about the accredited certifier has not been disposed of.

**16 Expiration of suspension**

On the expiration of a period of suspension imposed under this Division, the person's rights and privileges as an accredited certifier are revived, subject to:

- (a) any order of the Board under this Division that imposes a condition on the person's certificate of accreditation, or
- (b) any order of the Tribunal on the complaint that is referred to the Tribunal.

**17 Duration of conditions—complaint matters**

- (1) If the Board imposes conditions on the certificate of accreditation of an accredited certifier under this Division, the conditions imposed by the Board have effect until the complaint about the accredited certifier is disposed of, or the conditions are removed by the Board, whichever happens first.
- (2) This section:
  - (a) does not prevent conditions being imposed under another provision of this Act, and
  - (b) is subject to anything done by the Tribunal under Part 3.

**Division 4 General provisions**

**18 Review of decisions of Board under this Part**

A person may apply to the Tribunal for a review of any of the following decisions of the Board under this Part:

- (a) to refuse an application by the person for the issue of a certificate of accreditation,
- (b) to refuse an application by the person for the renewal of a certificate of accreditation,
- (c) to issue a certificate of accreditation to the person of a different category to that for which the person applied,
- (d) to refuse to renew the person's certificate of accreditation and instead to issue to the person a certificate of a different category to that for which the person applied for renewal,
- (e) to vary a term or condition of, or impose conditions on, the person's certificate of accreditation (other than conditions prescribed by the regulations),
- (f) to suspend or cancel the person's certificate of accreditation.

## Part 3 Disciplinary proceedings

### Division 1 Preliminary

#### 19 Definitions

In this Part:

**complaint** means a complaint about an accredited certifier made under section 21.

**disciplinary finding** means a finding of unsatisfactory professional conduct or professional misconduct.

**professional misconduct**, in relation to an accredited certifier, means conduct that is unsatisfactory professional conduct of a sufficiently serious nature to justify suspension or cancellation of the accredited certifier's certificate of accreditation.

**unsatisfactory professional conduct** of an accredited certifier means any of the following (whether consisting of an act or omission):

- (a) conduct occurring in connection with the exercise of the accredited certifier's functions as a certifying authority that falls short of the standard of competence, diligence and integrity that a member of the public is entitled to expect of a reasonably competent accredited certifier,
- (b) a contravention of this Act or the *Environmental Planning and Assessment Act 1979*, or the regulations under either of those Acts, by the accredited certifier, whether or not he or she is prosecuted or convicted for the contravention,
- (c) a contravention by the accredited certifier of a law (whether or not a New South Wales law, and whether or not the contravention is an offence) that relates to the functions or obligations of a person as an accredited certifier or the holder of an equivalent authorisation, or involves fraud or dishonesty, whether or not he or she is prosecuted or convicted for the contravention,
- (d) a failure to comply with a statutory or other duty, or a contractual obligation, imposed on the accredited certifier by or in accordance with a law (whether or not a New South Wales law) that relates to the functions or obligations of a person as an accredited certifier or the holder of an equivalent authorisation,
- (e) the exercise by the accredited certifier of his or her functions as a certifying authority in a partial manner,
- (f) the wilful disregard by the accredited certifier of matters to which he or she is required to have regard in exercising his or her functions as a certifying authority,

- (g) a failure by the accredited certifier to comply with any relevant code of conduct contained in the accreditation scheme,
- (h) a failure by the accredited certifier to comply with a term or condition of the certificate of accreditation,
- (i) a failure by an accredited certifier to comply with an order of the Board or the Tribunal under this Act,
- (j) a failure by the accredited certifier, without reasonable excuse, to comply with a direction or requirement under Part 5,
- (k) wilfully misleading or obstructing the Board in the exercise of any function under this Part or Part 4 or 5,
- (l) any other improper or unethical conduct of the accredited certifier that indicates that he or she is unfit to properly carry out the duties of an accredited certifier,
- (m) any other conduct prescribed by the regulations for the purposes of this definition.

## **20 General provisions concerning disciplinary proceedings**

- (1) If an accredited certifier has died:
  - (a) a person cannot make a complaint against the accredited certifier, and
  - (b) the Board is not to investigate (or continue to investigate) a complaint made against the accredited certifier or to make an application to the Tribunal for a disciplinary finding against the accredited certifier, and
  - (c) the Tribunal is not to determine an application for a disciplinary finding against the accredited certifier.
- (2) A complaint against an accredited certifier may be made and dealt with even though the relevant certificate of accreditation has been suspended or cancelled or has lapsed. For that purpose, a reference in this Part to an accredited certifier includes a reference to a person whose certificate of accreditation has been suspended or cancelled or has lapsed.
- (3) Despite subsection (2), the Board may decide not to investigate or make a decision under section 31 on a complaint (or may decide to terminate an investigation or dismiss proceedings in relation to a complaint) if the person who is the subject of the complaint is no longer an accredited certifier.
- (4) Despite subsection (2), the Tribunal may decide not to determine an application for a disciplinary finding against an accredited certifier (or may decide to dismiss proceedings for such an application) if the person to whom the application relates is no longer an accredited certifier.

## **Division 2 Making of complaints and preliminary procedures**

### **21 Procedure for making complaint**

- (1) A person may make a complaint to the Board against an accredited certifier in respect of the accredited certifier's professional conduct.
- (2) A complaint is:
  - (a) to be in writing and in the form (if any) approved by the Board, and
  - (b) to contain particulars of the allegations on which it is founded, and
  - (c) to be verified by statutory declaration.
- (3) The Board may require the complainant to provide further particulars of the complaint.
- (4) The Board may decline to deal with a complaint if further particulars are not provided as required under subsection (3).
- (5) Unless the Board declines to deal with a complaint against an accredited certifier under subsection (4), the Board must, within 28 days after receiving the complaint:
  - (a) inform the accredited certifier of the nature of the complaint, and
  - (b) by notice, invite the accredited certifier to make, within such time (being at least 7 days) as the Board specifies in the notice, such submissions in writing to the Board with respect to the complaint as he or she thinks fit.
- (6) The Board may, if it considers it appropriate to do so, give a copy of the complaint to the person against whom the complaint is made.

### **22 Initial assessment of complaints by Board**

- (1) After the period for making submissions on a complaint under section 21 (5) (b) has expired, the Board is to assess whether the complaint should be dismissed or investigated.
- (2) The Board in its assessment of a complaint is to take into account any submissions received in accordance with section 21 (5) (b).
- (3) If the Board is of the opinion that the complaint should be investigated, the Board is to arrange for the investigation of the complaint.

**23 Dismissal of complaints**

The Board may dismiss a complaint at any time (including during the investigation of the complaint) for any of the following reasons:

- (a) if further particulars of the complaint are not given, or the complaint or the further particulars are not verified, as required by the Board,
- (b) if the Board is of the opinion that the complaint is trivial, vexatious, frivolous, misconceived or lacking in substance or has not been made in good faith,
- (c) if the complaint has been dealt with previously by the Board (or by an accreditation body under the *Environmental Planning and Assessment Act 1979* as in force before the commencement of this section) or another complaint has already been lodged in respect of the same matter,
- (d) if the Board considers that there is or was a satisfactory alternative means available to the complainant of resolving the matter the subject of the complaint and the complainant does not have a reasonable cause for not pursuing the alternative means,
- (e) if the Board is of the opinion that the complaint deals with matters that do not constitute professional misconduct or unsatisfactory professional conduct,
- (f) if the Board is of the opinion that the matter could be appropriately dealt with by conciliation (regardless of whether the parties agree to undertake conciliation) and the Board does not consider that the complaint needs to be investigated,
- (g) if the complaint relates to a matter that occurred more than 3 years before the making of the complaint.

**24 Conciliation of complaints**

- (1) If the Board thinks it appropriate to do so, the Board may recommend to a complainant and the accredited certifier the subject of the complaint that they undertake conciliation of the complaint (whether or not the complaint has been dismissed or is being investigated).
- (2) The Board may arrange for one of its officers to assist in conciliation of a complaint.
- (3) The Board is not prevented from investigating a complaint because the parties to the complaint agree to undertake conciliation of the complaint.
- (4) Evidence of anything said or of any admission made during the conciliation process is not admissible in any proceedings before a court, tribunal or body.

- (5) A document prepared for the purposes of, or in the course of, the conciliation process (or a copy of such a document) is not admissible in any proceedings before a court, tribunal or body.
- (6) This section does not apply to evidence or a document if the persons who attended, or were named during, the conciliation process and, in the case of a document, all persons named in the document, consent to admission of the evidence or document.
- (7) A person cannot be required (whether by subpoena or any other procedure) to produce evidence or a document that is inadmissible in evidence in proceedings before a court, tribunal or body because of this section.

**25 Reference of complaint to another person or body for investigation**

- (1) The Board may, at any time while dealing with a complaint, refer the complaint (or part of the complaint) to another person or body if it appears that the complaint (or part) raises an issue that requires investigation by the other person or body.
- (2) However, the Board may continue to deal with the matter the subject of the complaint if it appears to the Board that the matter raises an issue of professional misconduct or unsatisfactory professional conduct of an accredited certifier.

**26 Withdrawal of complaint**

- (1) A complaint may be withdrawn at any time by the complainant.
- (2) However, the Board may continue to deal with the matter the subject of the complaint if it appears to the Board that the matter raises an issue of professional misconduct or unsatisfactory professional conduct of an accredited certifier.

**Division 3 Investigation of complaints**

**27 Investigation by Board of complaints**

- (1) The Board must, subject to this Part, conduct an investigation into each complaint made to it under this Part.
- (2) The Board may deal with one or more complaints about an accredited certifier in an investigation.
- (3) If during an investigation of any one or more complaints it appears to the Board that there is a matter in respect of which another complaint could have been made against the accredited certifier concerned or another accredited certifier, the Board may deal with the matter in its investigation as if a complaint had been made about it under section 21.

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- (4) If the Board decides to deal with a matter under subsection (3) as if a complaint had been made about it under section 21, the Board must give notice in writing to the accredited certifier concerned of the nature of the matter being investigated and inform the accredited certifier that the matter is being treated as a complaint.
  - (5) For the purposes of subsection (3), the Board may deal with a matter that could have been the subject of another complaint:
    - (a) whether that complaint could have been made instead of or in addition to any complaint that was in fact made, and
    - (b) whether or not that complaint could have been made by the same complainant.

**28 Investigation into complaint to be conducted expeditiously**

- (1) An investigation by the Board is to be conducted as expeditiously as possible.
- (2) In particular, the Board is to give priority to dealing with complaints that in its opinion may involve issues that pose a threat to public safety.
- (3) However, the Board may defer investigation of a complaint if the parties to the complaint have agreed to conciliate the complaint and the Board thinks that it is appropriate to await the outcome of conciliation.

**Division 4 Procedure after investigation of complaint****29 Report of investigation to be given to accredited certifier**

- (1) If an authorised officer is appointed by the Board to investigate a complaint, the authorised officer is to submit a written report to the Board on the results of the investigation.
- (2) The report may contain a recommendation of the authorised officer who prepared it that the Board give consideration to taking certain action in respect of the accredited certifier concerned.
- (3) On receiving the report, the Board is to give a copy of it to the accredited certifier who is the subject of the complaint with a notice that states that the accredited certifier may make written submissions to the Board within 28 days after the date of the notice.
- (4) The Board must take into account any submissions received in accordance with subsection (3).



- (5) If the Board requires an authorised officer to undertake further investigation of a complaint after the furnishing of a report under this section, this section applies to that further investigation.

**Note.** An example of when section 29 (5) would operate is if the Board adjourned a meeting at which a complaint was being considered to enable further investigation of the complaint to be carried out. (See section 30 (3) (b)).

### **30 Conduct of meeting dealing with complaint**

- (1) The Board may, if it considers it appropriate to do so, hold one or more meetings to consider a complaint.
- (2) At any such meeting, the Board:
- (a) may inform itself on any matter in such manner as it thinks fit, and
  - (b) may receive written or oral submissions, as it thinks fit, and
  - (c) is to proceed with as little formality and technicality, and as much expedition, as the requirements of this Act and the proper consideration of the complaint permit, and
  - (d) is not bound by rules of evidence, and
  - (e) may take evidence on oath, and
  - (f) may allow the accredited certifier concerned to be present or be represented by a legal practitioner or other person or may deal with the complaint in the absence of the accredited certifier.
- (3) Such a meeting:
- (a) is to be held in the absence of the public, and
  - (b) may be adjourned for any reason by the Board, including to enable further investigation to be carried out in relation to the complaint concerned.
- (4) For the purposes of this section, a member of the Board may administer an oath (or, if the meeting is being conducted by a committee that is exercising delegated functions, by a member of the committee).

### **31 Decision after investigation of complaint**

- (1) After the Board has completed an investigation into a complaint against an accredited certifier, the complaint is to be dealt with in accordance with this section.
- (2) The Board may apply to the Tribunal for a disciplinary finding against an accredited certifier under Division 5 if it is satisfied that there is a reasonable likelihood that the accredited certifier will be found guilty by the Tribunal of unsatisfactory professional conduct or it may instead exercise the functions conferred on it by subsection (4).

- (3) However, the Board must apply to the Tribunal for a disciplinary finding against an accredited certifier under Division 5 if it is satisfied that there is a reasonable likelihood that the accredited certifier will be found guilty by the Tribunal of professional misconduct.
- (4) If the Board is satisfied that the accredited certifier is guilty of unsatisfactory professional conduct (but not professional misconduct), the Board may take any one or more of the following actions:
  - (a) caution or reprimand the accredited certifier,
  - (b) by order impose such conditions on the accredited certifier's certificate of accreditation as it considers appropriate,
  - (c) order that the accredited certifier complete such educational courses as are specified by the Board within the time specified by the Board,
  - (d) order that the accredited certifier report on his or her practice as an accredited certifier at the times, in the manner and to the persons specified by the Board,
  - (e) order the accredited certifier to pay to the Board a fine of an amount not exceeding 100 penalty units within the time specified by the Board,
  - (f) order that no further action is to be taken by the Board in relation to the complaint if satisfied that the accredited certifier is generally competent and diligent and that no other material complaints (whether or not the subject of a disciplinary finding) have been made against the accredited certifier.
- (5) The Board is to dismiss the complaint against the accredited certifier if it is satisfied that the accredited certifier is not guilty of either unsatisfactory professional conduct or professional misconduct.
- (6) An order of the Board under this section takes effect on a date specified in the written statement of the decision given under section 32 or, if a statement is not required to be provided under that section, on a date specified in a notice in writing served on the person the subject of the complaint. Any such date must be a date occurring on or after service of the statement or notice on the person the subject of the complaint.

### **32 Board to give statement of decision**

- (1) The Board is to provide a written statement of a decision made under section 31 to the complainant and the accredited certifier concerned, and must do so as soon as practicable after the decision is made (bearing in mind the public welfare and seriousness of the matter).
- (2) The statement of a decision must:
  - (a) set out any findings on material questions of fact, and

- (b) refer to any evidence or other material on which the findings were based, and
  - (c) give the reasons for the decision.
- (3) The Board is not required to include confidential information in any such statement. If a statement would be false or misleading if it did not include the confidential information, the Board is not required to provide the statement.
- (4) When confidential information is not included in the statement of a decision provided to a person or the statement is not provided to a person because of subsection (3), the Board must give a confidential information notice to the person.
- (5) A **confidential information notice** is a notice that indicates that confidential information is not included or that the statement will not be provided (as appropriate) and gives the reasons for this. The notice must be in writing and must be given within one month after the decision is made.
- (6) This section does not affect the power of a court to make an order for the discovery of documents or to require the giving of evidence or the production of documents to a court.
- (7) In this section:  
**confidential information** means information that:
- (a) has not previously been published or made available to the public when a written statement of a decision to which it is or may be relevant is being prepared, and
  - (b) relates to the personal or business affairs of a person, other than a person to whom the Board is required (or would, but for subsection (3), be required) to provide a written statement of a decision, and
  - (c) is information:
    - (i) that was supplied in confidence, or
    - (ii) the publication of which would reveal a trade secret, or
    - (iii) that was provided in compliance with a duty imposed by an enactment, or
    - (iv) the provision of which by the Board would be in breach of any enactment.

**33 Person may apply to Tribunal for a review of disciplinary finding of Board**

A person in respect of whom the Board has made a disciplinary finding may apply to the Tribunal for a review of that finding and any action taken by the Board under section 31 (4).

**Division 5 Role of Tribunal in complaints process****34 Tribunal may make certain disciplinary findings**

- (1) If an application is made to the Tribunal under section 31 for a disciplinary finding in relation to an accredited certifier, the Tribunal is to determine whether or not the accredited certifier is guilty of unsatisfactory professional conduct or professional misconduct.
- (2) If the Tribunal finds that the accredited certifier is guilty of unsatisfactory professional conduct or professional misconduct, the Tribunal may make any one or more of the following decisions:
  - (a) caution or reprimand the accredited certifier,
  - (b) direct that such conditions as it considers appropriate be imposed on the accredited certifier's certificate of accreditation,
  - (c) order that the accredited certifier complete such educational courses as are specified by the Tribunal,
  - (d) order that the accredited certifier report on his or her practice as an accredited certifier at the times, in the manner and to the persons specified by the Tribunal,
  - (e) order the accredited certifier to pay to the Board a fine of an amount, not exceeding 1,000 penalty units, specified in the order,
  - (f) order the accredited certifier to pay to the complainant such amount (not exceeding \$20,000) as the Tribunal considers appropriate by way of compensation for any damage suffered by the complainant as a result of the unsatisfactory professional conduct or professional misconduct,
  - (g) suspend the accredited certifier's certificate of accreditation for such period as the Tribunal thinks fit,
  - (h) cancel the accredited certifier's certificate of accreditation,
  - (i) order that the accredited certifier cannot re-apply for a certificate of accreditation within such period (including the period of his or her lifetime) as may be specified by the Tribunal.
- (3) If the Tribunal finds that the accredited certifier is not guilty of unsatisfactory professional conduct or professional misconduct, it is to dismiss the application.

- (4) The Tribunal may not make an order under subsection (2) (f) without the consent of the complainant and the making of any such order does not affect any right of the complainant to bring an action to seek additional compensation.

**35 Tribunal may award costs**

The Tribunal may award costs under section 88 of the *Administrative Decisions Tribunal Act 1997* in respect of proceedings commenced by an application made under this Part.

**36 Appeals to Appeal Panel against decisions and orders of the Tribunal**

An order or other decision made by the Tribunal under this Division may be appealed to an Appeal Panel of the Tribunal under Part 1 of Chapter 7 of the *Administrative Decisions Tribunal Act 1997* by a party to the proceedings in which the order or decision is made.

**37 Confidential information in statement of reasons**

- (1) The Tribunal is not required to include confidential information in the statement of reasons given under section 89 or 117 of the *Administrative Decisions Tribunal Act 1997*. If a statement would be false or misleading if it did not include the confidential information, the Tribunal is not required to provide the statement.
- (2) When confidential information is not included in the statement of a decision provided to a person or the statement is not provided to a person because of subsection (1), the Tribunal must give a confidential information notice to the person.
- (3) A ***confidential information notice*** is a notice that indicates that confidential information is not included or that the statement will not be provided (as appropriate) and gives the reasons for this. The notice must be in writing and must be given within one month after the decision is made.
- (4) This section does not affect the power of a court to make an order for the discovery of documents or to require the giving of evidence or the production of documents to a court.
- (5) In this section:  
***confidential information*** means information that:
- (a) has not previously been published or made available to the public when a written statement of a decision to which it is or may be relevant is being prepared, and
  - (b) relates to the personal or business affairs of a person, other than a person to whom the Tribunal is required (or would, but for

subsection (1), be required) to provide a written statement of a decision, and

- (c) is information:
- (i) that was supplied in confidence, or
  - (ii) the publication of which would reveal a trade secret, or
  - (iii) that was provided in compliance with a duty imposed by an enactment, or
  - (iv) the provision of which by the Tribunal would be in breach of any enactment.

## **Division 6 Publicising disciplinary action**

### **38 Definitions**

In this Division:

*accredited certifier* includes a former accredited certifier.

*disciplinary action* means any of the following action:

- (a) any action taken by the Board under section 31 (4) or by the Tribunal under section 34 (2) in respect of an accredited certifier,
- (b) the suspension of, or imposition of conditions on, a certificate of accreditation under Division 3 of Part 2.

### **39 Publicising disciplinary action**

- (1) The Board must publicise disciplinary action taken against an accredited certifier (including the name and other identifying particulars of the person against whom the disciplinary action was taken).
- (2) The Board may publicise disciplinary action taken against an accredited certifier in any manner the Board thinks fit.
- (3) Without limiting subsection (2), it is sufficient compliance with subsection (1) if the Board ensures that the information referred to in subsection (1) is placed on the register of disciplinary action required to be kept under this Division.
- (4) The requirement to publicise disciplinary action applies only to disciplinary action taken after the commencement of this section. However, the Board may publicise disciplinary action taken under the *Environmental Planning and Assessment Act 1979* before the commencement of this section in accordance with this Division.
- (5) This section extends to disciplinary action taken outside this State, to the extent that the particulars of that disciplinary action are known to the Board.

**40 Register of disciplinary action**

- (1) The Board must keep a register of disciplinary action taken against accredited certifiers.
- (2) The register is to include the following:
  - (a) the name and other identifying particulars of the person against whom the disciplinary action was taken,
  - (b) particulars of the disciplinary action taken.
- (3) The Board is to ensure that the register is made available to the public, free of charge, at the Board's offices during ordinary office hours and in any other manner that the Board directs.
- (4) The Board may, on request, provide information recorded in the register to members of the public in any other manner.
- (5) The Board may correct any error in or omission from the register.
- (6) The requirement to keep a register of disciplinary action applies only to disciplinary action taken after the commencement of this section. However, the Board may include in the register disciplinary action taken before the commencement of this section, or publicise such action in any other manner, in accordance with this Division.
- (7) This section extends to disciplinary action taken outside this State, to the extent that the particulars of that disciplinary action are known to the Board.

**41 Quashing or variation of disciplinary action**

- (1) If disciplinary action is quashed or varied on appeal or review after the action was publicised by the Board under this Division, the result of the appeal or review is to be publicised with equal prominence by the Board.
- (2) If the disciplinary action was recorded in the register kept by the Board under this Division, any reference to that disciplinary action is to be removed from the register or varied, as appropriate.

**42 Liability for publicising disciplinary action**

- (1) No liability is incurred by the State, the Board, the Director or any person acting at the direction of the Board or Director in respect of anything done in good faith for the purpose of:
  - (a) publicising disciplinary action under this Division, or
  - (b) exercising the functions of the Board under this Division.

- (2) No liability is incurred by a person publishing in good faith disciplinary action, or a fair report or summary of disciplinary action, recorded in a register kept by the Board, or otherwise publicised by the Board, under this Division.
- (3) In this section:  
*liability* includes liability in defamation.

#### **43 General**

- (1) The provisions of this Division are subject to any order made by the Tribunal under section 75 of the *Administrative Decisions Tribunal Act 1997*.  
**Note.** Section 75 of the *Administrative Decisions Tribunal Act 1997* allows the Tribunal to make an order prohibiting or restricting the disclosure of information.
- (2) If disciplinary action involves the suspension or cancellation of the certificate of accreditation held by a person because of the infirmity, injury or mental or physical illness of the person, the reason for the suspension or cancellation, and any other information relating to the infirmity, injury or mental or physical illness of the person, is not to be recorded in the register kept under this Division or otherwise publicised.
- (3) Despite subsection (2), the name and other identifying particulars of the person against whom the disciplinary action was taken, and the kind of disciplinary action taken, must be publicised, and recorded in the register kept under this Division, in accordance with the requirements set out in this Division.

### **Division 7 Miscellaneous**

#### **44 Duty of confidentiality of client communications**

- (1) An accredited certifier must comply with a requirement under this Part or Part 4 or 5 to answer a question or to produce information or a document despite any duty of confidentiality in respect of a communication between the accredited certifier and a client.
- (2) Subsection (1) applies only if the client is the complainant or consents to the disclosure of the communication concerned.
- (3) An accredited certifier may disclose a matter to the Board or the Tribunal in breach of any such duty of confidentiality if the Board or Tribunal is satisfied that it is necessary for the accredited certifier to do so in order to rebut an allegation in the complaint.



## **Part 4 Investigation of certifying authorities**

### **45 Investigation of councils acting as certifying authorities**

- (1) The Board may appoint a member of its staff as an authorised officer to investigate the work and activities of a council in its capacity as a certifying authority.
- (2) The authorised officer must report to the Board on the results of the investigation.
- (3) The Board must send a copy of the report to the Director-General of the Department of Local Government and to the council.
- (4) A report furnished to the council under this section must be presented at the next meeting of the council after the report is received.
- (5) Within 40 days after it receives a report under this section, a council must give written notice to the Director-General of the Department of Local Government and to the Board of the things done or proposed to be done to give effect to any recommendations contained in the report and may make submissions in relation to any matter contained in the report.
- (6) The Board must take into account any submissions received in accordance with subsection (5) and may revise its report.
- (7) If the Board revises its report, the Board must send a copy of the revised report to the Director-General of the Department of Local Government and to the council.
- (8) The Board is to make a copy of its report in its final form publicly available.
- (9) If the Board is of the opinion that a council has not taken appropriate action about a matter investigated under this section, the Board may make recommendations to the Director-General of the Department of Local Government as to the measures that it considers appropriate to be taken in relation to the matter.

### **46 Investigation of accredited certifiers acting as certifying authorities**

- (1) The Board may appoint a member of its staff as an authorised officer to investigate the work and activities of an accredited certifier in his or her capacity as a certifying authority.
- (2) The authorised officer must report to the Board on the results of the investigation.

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- (3) The Board must send a copy of the report to the accredited certifier with a notice that states that the accredited certifier may make written submissions to the Board within 28 days after the date of the notice.
  - (4) The Board must take into account any submissions received in accordance with subsection (3).
  - (5) If satisfied, as a result of any such investigation, that the accredited certifier is or may be guilty of unsatisfactory professional conduct or professional misconduct within the meaning of Part 3, the Board may take any action under Part 3 in relation to any matter arising from the report that it could take in relation to a complaint, including applying to the Tribunal for a disciplinary finding in accordance with section 31.
  - (6) The Tribunal may take any action under Division 5 of Part 3 in relation to a matter arising from the report that is referred to the Tribunal by the Board that it could take in relation to a complaint.

**47 Extension of investigations to former accredited certifiers**

- (1) An investigation under this Part may be carried out in relation to a person whose certificate of accreditation has been suspended or cancelled or has lapsed.
- (2) Accordingly, any powers of an authorised officer in relation to the carrying out of an investigation under this Part may be exercised in relation to a person referred to in subsection (1).

## **Part 5 Powers relating to investigations**

### **Division 1 Powers of Board and authorised officers to require production of evidence**

#### **48 Powers of Board or authorised officer to obtain evidence**

- (1) For the purposes of carrying out an investigation under Part 3 or 4, the Board or an authorised officer may direct a person to do any one or more of the following:
  - (a) to appear personally before the Board or authorised officer at a time and place specified in the direction,
  - (b) to give evidence (including evidence on oath),
  - (c) to produce to the Board or authorised officer any document that is in that person's custody or under that person's control,
  - (d) to grant to the Board or authorised officer such authorities as may be necessary to enable the Board or authorised officer to gain access to any document that is in the custody or under the control of any other person.
- (2) The Board or an authorised officer may inspect any document produced under this section and may retain it for such period as the Board or officer thinks necessary for the purposes of the investigation in relation to which it was produced. The Board or authorised officer may make copies of the document or any part of the document.
- (3) If the accredited certifier against whom any complaint is made (or taken to be made) claims a lien over documents relating to the matter the subject of the complaint, the Board may require the accredited certifier to waive the lien if satisfied it is necessary for the orderly transaction of the complainant's business.
- (4) For the purposes of this section, a member of the Board or an authorised officer may administer an oath (or, if the investigation is being conducted by a committee that is exercising delegated functions, by a member of the committee).

### **Division 2 Power of entry to premises**

#### **49 Power of entry**

- (1) An authorised officer may enter any premises if it is reasonably necessary for the purpose of carrying out an investigation under Part 3 or 4.

- (2) Entry may only be made at any reasonable hour in the daytime or at any hour during which business is in progress or is usually carried on at the premises.
- (3) When exercising a power of entry under this Part, an authorised officer may be accompanied by such assistants as the authorised officer considers necessary.

#### **50 Inspections and investigations**

A person authorised to enter premises under this Part may:

- (a) inspect the premises and any article, matter or thing on the premises, and
- (b) for the purpose of an inspection:
  - (i) open any ground and remove any flooring and take such measures as may be necessary to ascertain the character and condition of the premises and of any pipe, sewer, drain, wire or fitting, and
  - (ii) require the opening, cutting into or pulling down of any work if the person authorised has reason to believe or suspect that anything on the premises has been done in contravention of this Act or the *Environmental Planning and Assessment Act 1979*, or the regulations under either of those Acts or an environmental planning instrument, and
- (c) take measurements, make surveys and take levels and, for those purposes, dig trenches, break up the soil and set up any posts, stakes or marks, and
- (d) require any person at those premises to answer questions or otherwise furnish information in relation to the matter the subject of the inspection or investigation, and
- (e) take samples or photographs, and make video and audio recordings, in connection with any inspection, and
- (f) seize anything that the person suspects on reasonable grounds is connected with an offence against this Act or the *Environmental Planning and Assessment Act 1979*, or the regulations under either of those Acts or secure any such thing against interference.

#### **51 Use of force**

- (1) Reasonable force may be used for the purpose of gaining entry to any premises (other than residential premises) under a power conferred by this Part, but only if authorised by the Board in accordance with this section.

- (2) The authority of the Board:
  - (a) must be in writing, and
  - (b) must be given in respect of the particular entry concerned, and
  - (c) must specify the circumstances which are required to exist before force may be used.

**52 Notification of use of force or urgent entry**

- (1) A person authorised to enter premises under this Part who:
  - (a) uses force for the purpose of gaining entry to the premises, or
  - (b) enters the premises in an emergency without giving written notice to the owner or occupier,must promptly advise the Board.
- (2) The Board must give notice of the entry to such persons or authorities as appear to the Board to be appropriate in the circumstances.

**53 Care to be taken**

- (1) In the exercise of a function under this Part, a person authorised to enter premises must do as little damage as possible. The Board must provide, if necessary, other means of access in place of any taken away or interrupted by a person authorised by the Board.
- (2) As far as practicable, entry on to fenced land is to be made through an existing opening in the enclosing fence. If entry by that means is not practicable, a new opening may be made in the enclosing fence, but the fence is to be fully restored when the need for entry ceases.

**54 Compensation**

The Board must pay compensation for any damage caused by any person authorised by the Board under this Part to enter premises, other than damage arising from work done for the purpose of an inspection which reveals that there has been a contravention of this Act or the *Environmental Planning and Assessment Act 1979*, the regulations under either of those Acts or an environmental planning instrument.

**55 Authority to enter premises**

- (1) A power conferred by this Division on an authorised officer to enter premises, or to make an inspection or take other action on premises, or to make a requirement of any person may not be exercised unless the authorised officer is in possession of an authority and produces the authority if required to do so by the owner or occupier of the premises concerned or the person of whom the requirement is made.

- (2) The authority must be a written authority which is issued by the Board and which:
  - (a) states that it is issued under this Act, and
  - (b) gives the name of the authorised officer to whom it is issued, and
  - (c) describes the nature of the powers conferred and the source of the powers, and
  - (d) states the date (if any) on which it expires, and
  - (e) describes the kind of premises to which the power extends.
- (3) This section does not apply to a power conferred by a search warrant.

#### **56 Restrictions on power of entry to residential premises**

The powers of entry and inspection conferred by this Division are not exercisable in relation to any part of premises being used for residential purposes except:

- (a) with the permission of the occupier of that part of the premises, or
- (b) under the authority conferred by a search warrant.

#### **57 Search warrants**

- (1) An authorised officer may apply to an authorised justice if the authorised officer has reasonable grounds for believing that it is necessary to enter premises for the purposes of carrying out an investigation under Part 3 or 4.
- (2) An authorised justice to whom such an application is made may, if satisfied that there are reasonable grounds for doing so, issue a search warrant authorising an authorised officer named in the warrant:
  - (a) to enter the premises, and
  - (b) to search the premises for evidence relevant to the investigation of the complaint concerned.
- (3) Part 3 of the *Search Warrants Act 1985* applies to a search warrant issued under this section.
- (4) Without limiting the generality of section 18 of the *Search Warrants Act 1985*, a police officer:
  - (a) may accompany an authorised officer executing a search warrant issued under this section, and
  - (b) may take all reasonable steps to assist the authorised officer in the exercise of the officer's functions under this section.
- (5) In this section, **authorised justice** has the same meaning as in the *Search Warrants Act 1985*.

### **Division 3 General provisions**

#### **58 Obstruction of authorised persons**

- (1) A person must not obstruct, hinder or interfere with an authorised officer in the exercise of the authorised officer's functions under this Part.
- (2) A person must not fail to comply with a direction or requirement of the Board or an authorised officer made in accordance with this Part.  
Maximum penalty: 50 penalty units.

#### **59 Limitation on self-incrimination**

- (1) A person who is required under this Act to answer a question, produce a thing or provide information is not excused from answering the question, producing that thing or providing the information on the ground that the answer to the question, the production of the thing or the provision of the information might tend to incriminate the person or make the person liable to a penalty.
- (2) However, any answer given to a question, any thing produced or any information provided by a natural person in compliance with a requirement under this Act is not admissible in evidence against the person in criminal proceedings (except proceedings for an offence against section 58 of this Act or section 307B or 307C of the *Crimes Act 1900*).

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## **Part 6 Requirements relating to accredited certifiers**

### **Division 1 Record keeping and notifications**

#### **60 Record keeping by accredited certifiers**

- (1) An accredited certifier must, in accordance with the regulations, cause such documents and records to be kept as are prescribed by the regulations.
- (2) If the Board requests, by notice in writing served on an accredited certifier, that the accredited certifier provide a copy to the Board of any document or record required to be kept under subsection (1), the accredited certifier must provide a copy of the document or record to the Board within the time specified in the notice.  
Maximum penalty: 50 penalty units.

#### **61 Board to be notified of certain events**

- (1) An accredited certifier must notify the Board in writing of each of the following events within 7 days of the accredited certifier becoming aware of the event:
  - (a) the suspension or cancellation of an equivalent authorisation held by the accredited certifier,
  - (b) the variation of conditions of, or imposition of conditions on, an equivalent authorisation held by the accredited certifier,
  - (c) the institution of proceedings against the accredited certifier for an offence that relates to the functions or obligations of a person as an accredited certifier or the holder of an equivalent authorisation, or involves fraud or dishonesty,
  - (d) the investigation of a complaint against the accredited certifier by an authority of another jurisdiction in relation to anything done or omitted by the accredited certifier as the holder of an equivalent authorisation,
  - (e) the accredited certifier's ceasing to be covered by the insurance required by Division 2 (unless notification as referred to in subsection (2) (b) has already been provided to the Board),
  - (f) any other event prescribed by the regulations for the purposes of this subsection.Maximum penalty: 50 penalty units.
- (2) At least 7 days before the insurance held by an accredited certifier for the purposes of Division 2 expires, the accredited certifier must notify the Board in writing:



- (a) that arrangements have been made for the accredited certifier to be covered from that expiry by further insurance and including in that notification evidence of those arrangements, or
- (b) stating that the accredited certifier has been unable to obtain further insurance to take effect from that expiry.

Maximum penalty: 50 penalty units.

- (3) An accredited certifier must notify the Board in writing of any change required to the particulars recorded in the Register in relation to the accredited certifier (other than a change required because of an event referred to in subsection (1)) within 14 days of the accredited certifier becoming aware of the need for the change.

Maximum penalty: 10 penalty units.

## **Division 2 Insurance**

### **62 Application of Division**

This Division applies to:

- (a) accredited certifiers, and
- (b) such other persons as are prescribed by the regulations for the purposes of this section (referred to in this Division as *building practitioners*).

### **63 Accredited certifiers to have required insurance**

- (1) An accredited certifier must not:
  - (a) exercise the functions of a certifying authority, or
  - (b) hold himself or herself out as being covered by the required insurance,

unless he or she is covered by the required insurance.

Maximum penalty: 100 penalty units.

- (2) For the purposes of this section, an accredited certifier is covered by the required insurance if he or she is indemnified by an insurance policy that complies with the regulations against any liability to which he or she may become subject as a result of exercising the functions of a certifying authority.
- (3) For the purposes of this section, an accredited certifier who is employed by a council to exercise the functions of a certifying authority on its behalf, whether within or beyond its area, is covered by the required insurance if the council is indemnified by its general insurance policy against any liability to which it may become subject as a result of the exercise of those functions by the accredited certifier.

**64 Building practitioners**

- (1) In this section:
- building work* includes the design or inspection of building work and the issuing of a Part 4A certificate or complying development certificate in respect of building work.
- subdivision work* includes the design or inspection of subdivision work and the issuing of a Part 4A certificate or complying development certificate in respect of subdivision work.
- (2) A building practitioner must not:
- (a) carry out any building work or subdivision work, or
  - (b) hold himself or herself out as being covered by the required insurance,
- unless he or she is covered by the required insurance.
- Maximum penalty: 500 penalty units (in the case of a corporation) or 100 penalty units (in any other case).
- (3) For the purposes of this section, a building practitioner is covered by the required insurance if he or she is indemnified by an insurance policy that complies with the regulations against any liability to which he or she may become subject as a result of carrying out building work or subdivision work.

**65 Regulations under this Division**

Without limiting the matters for which the regulations may provide in relation to an insurance policy, the regulations may make provision for or with respect to the following:

- (a) the persons or bodies who may be the insurers under such a policy,
  - (b) the period for which the insured is to be indemnified under such a policy,
  - (c) the amount in respect of which the insured is to be indemnified under such a policy,
  - (d) the risks in respect of which the insured is to be indemnified under such a policy,
  - (e) the form in which such a policy must be expressed,
  - (f) the obligations on a person who is the insurer under such a policy,
  - (g) the issue of such a policy in respect of liability incurred by a person who was formerly an accredited certifier.
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### **Division 3 Conflicts of interest**

#### **66 Conflicts of interest**

- (1) An accredited certifier must not issue a Part 4A certificate or complying development certificate in relation to any aspect of development:
- (a) if he or she has been involved in the design of that aspect of the development, or
  - (b) if he or she has been involved in the carrying out of work on that aspect of the development, or
  - (c) if he or she is the applicant for the certificate or is related to the applicant for the certificate, or
  - (d) if he or she is associated with the council of the area in which the development is to be carried out, or
  - (e) if he or she is related to a person who was involved in the design or construction of that aspect of the development, or
  - (f) if he or she has a pecuniary interest in that or any other aspect of the development.

Maximum penalty: 300 penalty units.

- (2) If an accredited certifier issues (otherwise than as a principal certifying authority) a compliance certificate of the kind referred to in section 109C (1) (a) (i) of the *Environmental Planning and Assessment Act 1979* for an aspect of development, the accredited certifier:
- (a) does not contravene subsection (1) (a) by being involved in the design of that aspect of the development, and
  - (b) does not contravene subsection (1) (e) by being related to a person who was involved in the design of that aspect of the development.
- (3) Subsection (1) does not make it an offence for an accredited certifier who is an employee of a council to issue a Part 4A certificate in relation to development that is to be carried out in the area of the council if:
- (a) the certificate relates to development for which the council is not the consent authority, and
  - (b) the accredited certifier issues the certificate in the course of his or her employment with the council.
- (4) Subsection (1) does not apply to any action of an accredited certifier that is done in accordance with an exemption issued under section 71.

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**67 Meaning of being involved in the design of an aspect of the development**

- (1) For the purposes of this Division, an accredited certifier is involved in the design of an aspect of development:
  - (a) if the accredited certifier is involved in the preparation of the plans or specifications for that aspect of the development, or
  - (b) in such other circumstances as may be prescribed by the regulations.
- (2) Despite subsection (1), the regulations may prescribe, for the purposes of this Division, circumstances in which an accredited certifier is taken not to be involved in the design of an aspect of development.

**68 Meaning of being related to another person**

For the purposes of this Division, an accredited certifier is related to another person if:

- (a) the accredited certifier is an employer, partner or employee of the other person, or
- (b) the accredited certifier is employed by the same employer as the other person, or
- (c) the accredited certifier is employed by a subsidiary (within the meaning of the *Corporations Act 2001* of the Commonwealth) of the other person or the other person controls (within the meaning of section 50AA of that Act) the employer of the accredited certifier, or
- (d) the other person is employed by a subsidiary (within the meaning of the *Corporations Act 2001* of the Commonwealth) of the employer of the accredited certifier or the accredited certifier controls (within the meaning of section 50AA of that Act) the employer of the other person, or
- (e) the accredited certifier is a spouse, de facto partner (whether of the same or the opposite sex), sibling, parent or child of the other person, or
- (f) the accredited certifier has a contractual arrangement with the other person that might reasonably be seen to give rise to a conflict between the accredited certifier's duties as an accredited certifier and the accredited certifier's interests under the arrangement.

**69 Meaning of being associated with a council**

For the purposes of this Division, an accredited certifier is associated with a council if the accredited certifier:

- (a) is a councillor or employee of the council, or

- (b) is related to a councillor or employee of the council, or
- (c) has a contractual arrangement with the council that might reasonably be seen to give rise to a conflict between the accredited certifier's duties as an accredited certifier and the accredited certifier's interests under the arrangement.

**70 Meaning of having a pecuniary interest**

- (1) For the purposes of this Division, an accredited certifier has a pecuniary interest in an aspect of development if there is a reasonable likelihood or expectation of appreciable financial gain or loss to the accredited certifier, or to a person to whom he or she is related.
- (2) However, an accredited certifier does not have such a pecuniary interest if the interest is so remote or insignificant that it could not reasonably be regarded as likely to influence any decision the person might make in relation to that aspect of the development.

**71 Board may grant exemptions from certain provisions relating to conflicts of interest**

- (1) The Board may, on application, grant an exemption in writing to an accredited certifier from all or any of the requirements of section 66 (1) (d) in relation to a particular development or class of development.
- (2) An exemption may be granted subject to conditions.

**Division 4 Other offences relating to improper conduct**

**72 Acting in a manner not authorised by certificate of accreditation**

An accredited certifier must not do any thing that is required by law to be done by an accredited certifier if the accredited certifier's certificate of accreditation does not authorise the accredited certifier to do that thing.

Maximum penalty: 300 penalty units.

**73 Contravention of terms and conditions of accreditation**

An accredited certifier must not contravene or fail to comply with any term or condition of the accredited certifier's certificate of accreditation.

Maximum penalty: 300 penalty units.

**74 Notice to be given of certain matters**

- (1) A person (other than a council) who is appointed as the principal certifying authority in relation to development must give notice, in

accordance with this section, to the person who made the appointment of:

- (a) the suspension or cancellation of the relevant certificate of accreditation, or
- (b) any change in the certificate of accreditation or conditions imposed on it that would prevent the appointed person from carrying out his or her duties as principal certifying authority for the development.

Maximum penalty: 50 penalty units.

- (2) A person who is required to give a notice under this section must give the notice in writing within 7 days after the person becomes aware of the matters to which the notice relates.

## **Part 7 Constitution and management of Board**

### **75 Constitution of Board**

- (1) There is constituted by this Act a corporation with the corporate name of the Building Professionals Board.
- (2) The Board is, for the purposes of any Act, a statutory body representing the Crown.
- (3) The Board is subject to the control and direction of the Minister in the exercise of its functions.

### **76 Membership and procedure of Board**

- (1) The Board is to consist of at least 3 members (but not more than 8 members) appointed by the Minister.
- (2) The Minister is to ensure that the persons appointed as members of the Board have knowledge or experience relevant to one or more of the following:
  - (a) building and construction law or administrative law,
  - (b) the building and subdivision certification process under the *Environmental Planning and Assessment Act 1979*,
  - (c) the building industry,
  - (d) government administration,
  - (e) local government development assessment processes,
  - (f) consumer protection.
- (3) Of the members appointed by the Minister, one is, in and by the instrument of appointment or another instrument made by the Minister, to be appointed as President of the Board and another as Deputy President of the Board.
- (4) Schedule 1 has effect with respect to the members and procedure of the Board.

### **77 Functions of Board**

The Board has the following functions:

- (a) the accreditation of persons as accredited certifiers for the purposes of the *Environmental Planning and Assessment Act 1979*,
- (b) the promotion and maintenance of standards of building and subdivision certification in New South Wales,
- (c) the investigation of complaints against accredited certifiers,

- (d) the taking of disciplinary action against accredited certifiers,
- (e) the investigation of certifying authorities,
- (f) the prosecution of offences against this Act or the regulations, or any offence under the *Environmental Planning and Assessment Act 1979* or the regulations under that Act that relates to accredited certifiers or certifying authorities,
- (g) the review of the accreditation scheme under this Act,
- (h) the investigation of matters referred to it by the Minister for advice and report in relation to accredited certifiers and the accreditation of certifiers,
- (i) the provision of advice to the Minister with respect to any other matter in connection with the administration of this Act,
- (j) such other functions as are conferred or imposed on the Board by or under this Act or any other Act.

**78 Staff of Board**

- (1) A Director and such other staff as may be necessary to enable the Board to exercise its functions are (subject to this section) to be employed under Chapter 2 of the *Public Sector Employment and Management Act 2002*.
- (2) The Board may arrange for the use of the services of any staff (by secondment or otherwise) or facilities of a government agency. For the purposes of this Act, a person whose services are utilised under this subsection is a member of the staff of the Board.
- (3) The Board may engage consultants or other persons for the purpose of obtaining services, information or advice.

**79 Appointment of advisory and other committees**

- (1) The Board may appoint such advisory or other committees as the Board considers appropriate for the purpose of assisting the Board in the exercise of its functions.
- (2) A committee has such functions as the Board may from time to time determine in respect of it.
- (3) A committee consists of such committee members appointed by the Board as the Board thinks fit.
- (4) It does not matter that any or all of the members of a committee are not members of the Board.
- (5) A committee member holds office for such period as is specified in the instrument of appointment of the committee member, but any such appointment may be terminated by the Board at any time.



- (6) One of the committee members, in and by the instrument by which the committee member is appointed, is to be appointed as chairperson of the committee.
- (7) A committee member is entitled to be paid such fees and allowances (if any) as the Minister may determine in respect of the committee member.
- (8) Subject to the regulations and any directions of the Board, the procedure of a committee appointed under this section is to be as determined by the committee.
- (9) The Board may dissolve a committee appointed under this section.

#### **80 Delegation of Board's functions**

- (1) Subject to subsection (2) and any regulations referred to in subsection (4), the Board may delegate to an authorised person any of its functions, other than this power of delegation.
- (2) Subject to any regulations referred to in subsection (4), the Board is to ensure that:
  - (a) a committee to which functions are delegated under this section comprises members who are suitably qualified to carry out those functions, and
  - (b) a committee to which the function of hearing or determining a complaint is delegated does not include any person who was involved in the assessment or investigation of the complaint, and
  - (c) a person to whom the function of hearing or determining a complaint is delegated has not been involved in the assessment or investigation of the complaint.
- (3) A delegate may sub-delegate to an authorised person any function delegated by the Board if the delegate is authorised in writing to do so by the Board.
- (4) The regulations may make provision for or with respect to the following:
  - (a) limiting or preventing the delegation by the Board of specified functions or types of functions,
  - (b) the qualifications of persons, or the composition of committees, to which specified functions or types of functions are delegated by the Board.
- (5) In this section, *authorised person* means:
  - (a) a member of staff of the Board (including the Director), or
  - (b) a committee appointed by the Board under section 79, or

- 
- (c) a person, or committee of persons, of a class approved by the Minister or prescribed by the regulations.

**81 Building Professionals Board Fund**

- (1) There is to be established in the Special Deposits Account a Building Professionals Board Fund (the **Fund**) into which is to be paid:
- (a) all money advanced to the Board by the Treasurer or appropriated by Parliament for the purposes of the Board, and
  - (b) all money directed or authorised to be paid into the Fund by or under this or any other Act, and
  - (c) the fees payable to the Board under this Act, and
  - (d) such amounts as are to be paid into the Fund under section 105 (6) of the *Environmental Planning and Assessment Act 1979*, and
  - (e) the proceeds of the investment of money in the Fund, and
  - (f) all money received by the Board from any other source.
- (2) The Fund may be expended in the payment of the expenses of the Board in exercising its functions under this or any other Act or in any other manner directed by the Minister.

## **Part 8 Miscellaneous**

### **82 Notification of certain matters to employer of accredited certifiers and others**

- (1) The Board may give notice of the following matters relating to a person who is or was an accredited certifier to the employer (if any) of the person and any other person who the Board considers appropriate to be notified:
  - (a) any order made under this Act in respect of the person,
  - (b) the placing of conditions on the certificate of accreditation of the person,
  - (c) the suspension or cancellation of the person's certificate of accreditation,
  - (d) any restriction imposed on the person under this Act that prevents the person from re-applying for a certificate of accreditation (whether or not for a limited time).
- (2) The notice is to include such information as the Board considers appropriate.

### **83 Disclosure and misuse of information**

- (1) A person must not disclose any information obtained in connection with the administration or execution of this Act unless that disclosure is made:
  - (a) with the consent of the person from whom the information was obtained, or
  - (b) in connection with the administration or execution of this Act, or
  - (c) for the purposes of any legal proceedings arising out of this Act or of any report of any such proceedings, or
  - (d) in accordance with a requirement imposed under the *Ombudsman Act 1974*, or
  - (e) with other lawful excuse.
- (2) A person acting in the administration or execution of this Act must not use, either directly or indirectly, information acquired by the person in that capacity, being information that is not generally known but if generally known might reasonably be expected to affect materially the market value or price of any land, for the purpose of gaining either directly or indirectly an advantage for himself or herself, or a person with whom he or she is associated.

- (3) A person acting in the administration or execution of this Act, and being in a position to do so, must not, for the purpose of gaining either directly or indirectly an advantage for himself or herself, or a person with whom he or she is associated, influence:
- (a) the determination of a development application, or
  - (b) a decision concerning a complying development certificate, or
  - (c) the giving of an order under Division 2A of Part 6 of the *Environmental Planning and Assessment Act 1979*.
- (4) In this section, a person is associated with another person if the person is the spouse, de facto partner (whether of the same or the opposite sex), sibling, parent or child of the other person.  
Maximum penalty: 50 penalty units.

**84 Improper influence with respect to conduct of accredited certifier acting as certifying authority**

- (1) An accredited certifier must not, on an understanding that he or she will act otherwise than impartially in the exercise of his or her functions as a certifying authority, seek or accept, or offer or agree to accept, any benefit of any kind, whether on his or her own behalf or on behalf of any other person.  
Maximum penalty: 10,000 penalty units or imprisonment for 2 years, or both.
- (2) A person must not, on an understanding that an accredited certifier will act otherwise than impartially in the exercise of his or her functions as a certifying authority, give, or offer or agree to give, any benefit of any kind, whether to the accredited certifier or to any other person.  
Maximum penalty: 10,000 penalty units or imprisonment for 2 years, or both.
- (3) In this section, a reference to the functions of a certifying authority includes a reference to the functions of a principal certifying authority under section 109E of the *Environmental Planning and Assessment Act 1979*.

**85 False representations**

- (1) A person who:
- (a) issues a Part 4A certificate or complying development certificate that he or she is not authorised by or under this Act or the *Environmental Planning and Assessment Act 1979* to issue, or

(b) makes any statement that is false or misleading in a material particular in, or in connection with, a Part 4A certificate or complying development certificate,

is guilty of an offence against this Act.

Maximum penalty: 300 penalty units.

(2) An accredited certifier who falsely represents that he or she is a certifying authority or principal certifying authority in relation to any development is guilty of an offence against this Act.

Maximum penalty: 300 penalty units.

**86 Impersonation of authorised officers**

A person must not impersonate, or falsely represent that the person is, an authorised officer.

Maximum penalty: 50 penalty units.

**87 Documents to be provided to Board by accreditation bodies**

(1) The chief executive officer (however described) of a professional association that was authorised as an accreditation body under the *Environmental Planning and Assessment Act 1979* must not, without reasonable excuse, fail to provide copies to the Board of the following documents by a date notified in writing to the chief executive officer by the Board:

(a) all applications for accreditation made to the professional association under that Act,

(b) all notices and records, and all copies of notices and records, received by the professional association under that Act or the regulations under that Act,

(c) all records kept by the professional association, under that Act or under the regulations under that Act, in relation to complaints made to it under that Act.

Maximum penalty: 20 penalty units.

(2) Subsection (1) has effect despite the provisions of any law or the rules of association or constitution of the professional association concerned.

**88 Service of documents**

(1) A document that is authorised or required by this Act or the regulations to be served on any person may be served by:

(a) in the case of a natural person:

(i) delivering it to the person personally, or

- (ii) sending it by post to the address specified by the person for the giving or service of documents or, if no such address is specified, the residential or business address of the person last known to the person giving or serving the document, or
    - (iii) sending it by facsimile transmission to the facsimile number of the person, or
  - (b) in the case of a body corporate:
    - (i) leaving it with a person apparently of or above the age of 16 years at, or by sending it by post to, the head office, a registered office or a principal office of the body corporate or to an address specified by the body corporate for the giving or service of documents, or
    - (ii) sending it by facsimile transmission to the facsimile number of the body corporate.
- (2) Nothing in this section affects the operation of any provision of a law or of the rules of a court authorising a document to be served on a person in any other manner.

**89 Personal liability**

A matter or thing done or omitted to be done by the Board or a member of the Board, the Director, a member of a committee appointed under this Act, or a person acting under the direction of the Board or the Director does not, if the matter or thing was done or omitted in good faith for the purpose of executing this or any other Act, subject the member of the Board, the Director, the member of the committee or the person so acting personally to any action, liability, claim or demand.

**90 Recovery of money**

Any fee payable under this Act, and any monetary penalty imposed under this Act (other than for an offence), may be recovered by the Board in any court of competent jurisdiction as a debt due to the Board.

**91 Certificate evidence**

A certificate signed or purporting to be signed by the Director, or an officer of the Board authorised in writing by the Director, and stating that:

- (a) a person named in the certificate was or was not at a specified time an accredited certifier, or
- (b) any certificate of accreditation held by a specified person was or was not subject to a specified condition or was or was not suspended, or

(c) stating any other matter relating to the contents of the Register, is admissible in any legal proceedings and is evidence of the matters stated in the certificate.

## 92 Penalty notices

- (1) An authorised officer may serve a penalty notice on a person if it appears to the officer that the person has committed an offence against this Act or the regulations, being an offence prescribed by the regulations as a penalty notice offence.
- (2) A penalty notice is a notice to the effect that, if the person served does not wish to have the matter determined by a court, the person can pay, within the time and to the person specified in the notice, the amount of the penalty prescribed by the regulations for the offence if dealt with under this section.
- (3) A penalty notice may be served personally or by post.
- (4) If the amount of penalty prescribed for an alleged offence is paid under this section, no person is liable to any further proceedings for the alleged offence.
- (5) Payment under this section is not to be regarded as an admission of liability for the purpose of, and does not in any way affect or prejudice, any civil claim, action or proceeding arising out of the same occurrence.
- (6) The regulations may:
  - (a) prescribe an offence for the purposes of this section by specifying the offence or by referring to the provision creating the offence, and
  - (b) prescribe the amount of penalty payable for the offence if dealt with under this section, and
  - (c) prescribe different amounts of penalties for different offences or classes of offences.
- (7) The amount of a penalty prescribed under this section for an offence is not to exceed the maximum amount of penalty that could be imposed for the offence by a court.
- (8) This section does not limit the operation of any other provision of, or made under, this or any other Act relating to proceedings that may be taken in respect of offences.
- (9) In this section, *authorised officer* means a person authorised in writing by the Board as an authorised officer for the purposes of this section.

**93 Proceedings for offences**

- (1) Proceedings for an offence against this Act may be taken before a Local Court or before the Land and Environment Court in its summary jurisdiction.
- (2) Proceedings for an offence against the regulations may be taken before a Local Court.
- (3) If proceedings in respect of an offence against this Act are brought in a Local Court, the maximum monetary penalty that the court may impose in respect of the offence is, despite any other provisions of this Act, 1,000 penalty units or the maximum monetary penalty provided by this Act in respect of the offence, whichever is the lesser.
- (4) If proceedings in respect of an offence against this Act are brought in the Land and Environment Court in its summary jurisdiction, that Court may impose a penalty not exceeding the maximum penalty provided by this Act in respect of the offence.
- (5) Despite the *Criminal Procedure Act 1986* or any other Act, proceedings for an offence against this Act or the regulations may be commenced not later than 2 years after the date alleged to be the date on which the offence was committed.

**94 Regulations**

- (1) The Governor may make regulations, not inconsistent with this Act, for or with respect to any matter that by this Act is required or permitted to be prescribed or that is necessary or convenient to be prescribed for carrying out or giving effect to this Act.
- (2) In particular, regulations may be made for or with respect to the following:
  - (a) the keeping by the Board of a register of accredited certifiers and a register of disciplinary action,
  - (b) the issue of certificates of accreditation and the evidentiary value of such certificates,
  - (c) fees for applications under this Act,
  - (d) fees for the doing of anything by the Board in connection with the accreditation or renewal of accreditation of a person,
  - (e) fees for applications to the Board for approval of a change of principal certifying authority under the *Environmental Planning and Assessment Act 1979*,
  - (f) the waiver of fees (whether in whole or in part),



- (g) the surrender of certificates of accreditation,
- (h) the issue of replacement certificates of accreditation.

**95 Savings, transitional and other provisions**

Schedule 2 has effect.

**96 Amendment of other Acts and regulation**

The Acts and regulation specified in Schedule 3 are amended as set out in that Schedule.

**97 Review of Act**

- (1) The Minister is to review this Act to determine whether the policy objectives of the Act remain valid and whether the terms of the Act remain appropriate for securing those objectives.
- (2) The review is to be undertaken as soon as possible after the period of 5 years from the date of assent to this Act.
- (3) A report on the outcome of the review is to be tabled in each House of Parliament within 12 months after the end of the period of 5 years.

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## **Schedule 1      Constitution and procedure of Board**

(Section 76 (4))

### **Part 1      General**

#### **1      Definitions**

In this Schedule:

*Deputy President* means the Deputy President of the Board.

*member* means any member of the Board.

*President* means the President of the Board.

### **Part 2      Constitution**

#### **2      Terms of office of members**

Subject to this Schedule and the regulations, a member holds office for such period (not exceeding 3 years) as is specified in the member's instrument of appointment, but is eligible (if otherwise qualified) for re-appointment.

#### **3      Part-time appointments**

Members hold office as part-time members.

#### **4      Remuneration**

A member is entitled to be paid such remuneration (including travelling and subsistence allowances) as the Minister may from time to time determine in respect of the member.

#### **5      Duty of members to act in interests of Board**

A member has a duty to act in the best interests of the Board despite the fact that the member may have been appointed because of his or her involvement or membership in a professional association or other body.

#### **6      Acting members**

- (1) The Minister may, from time to time, appoint a person to act in the office of a member during the illness or absence of the member, and the person, while so acting, has and may exercise all the functions of the member and is taken to be a member.
- (2) The Minister may remove any person from any office to which the person was appointed under this clause.

- (3) A person while acting in the office of a member is entitled to be paid such remuneration (including travelling and subsistence allowances) as the Minister may from time to time determine in respect of the person.
- (4) For the purposes of this clause, a vacancy in the office of a member is taken to be an absence from the office of the member.

#### **7 Vacancy in office of member**

- (1) The office of a member becomes vacant if the member:
  - (a) dies, or
  - (b) completes a term of office and is not re-appointed, or
  - (c) resigns the office by instrument in writing addressed to the Minister, or
  - (d) is removed from office by the Minister under this clause, or
  - (e) is absent from 4 consecutive meetings of the Board of which reasonable notice has been given to the member personally or by post, except on leave granted by the President or unless the member is excused by the President for having been absent from those meetings, or
  - (f) becomes bankrupt, applies to take the benefit of any law for the relief of bankrupt or insolvent debtors, compounds with his or her creditors or makes an assignment of his or her remuneration for their benefit, or
  - (g) becomes a mentally incapacitated person, or
  - (h) is convicted in New South Wales of an offence that is punishable by imprisonment for 12 months or more or is convicted elsewhere than in New South Wales of an offence that, if committed in New South Wales, would be an offence so punishable.
- (2) The Minister may remove a member from office at any time.

#### **8 Filling of vacancy in office of member**

If the office of a member becomes vacant, a person is, subject to this Act and the regulations, to be appointed to fill the vacancy.

#### **9 President and Deputy President**

- (1) The President or Deputy President vacates office as President or Deputy President if he or she:
  - (a) is removed from that office by the Minister under this clause, or
  - (b) resigns that office by instrument in writing addressed to the Minister, or

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(c) ceases to be a member of the Board.

(2) The Minister may at any time remove the President or Deputy President from office as President or Deputy President.

#### **10 Disclosure of pecuniary interests**

(1) If:

(a) a member has a direct or indirect pecuniary interest in a matter being considered or about to be considered at a meeting of the Board, and

(b) the interest appears to raise a conflict with the proper performance of the member's duties in relation to the consideration of the matter,

the member must, as soon as possible after the relevant facts have come to the member's knowledge, disclose the nature of the interest at a meeting of the Board.

(2) A disclosure by a member at a meeting of the Board that the member:

(a) is a member, or is in the employment, of a specified company or other body, or

(b) is a partner, or is in the employment, of a specified person, or

(c) has some other specified interest relating to a specified company or other body or to a specified person,

is a sufficient disclosure of the nature of the interest in any matter relating to that company or other body or to that person which may arise after the date of the disclosure and which is required to be disclosed under subclause (1).

(3) Particulars of any disclosure made under this clause must be recorded by the Board in a book kept for the purpose and that book must be open at all reasonable hours to inspection by any person on payment of the fee determined by the Board.

(4) After a member has disclosed the nature of an interest in any matter, the member must not, unless the Minister or the Board otherwise determines:

(a) be present during any deliberation of the Board with respect to the matter, or

(b) take part in any decision of the Board with respect to the matter.

- (5) For the purposes of the making of a determination by the Board under subclause (4), a member who has a direct or indirect pecuniary interest in a matter to which the disclosure relates must not:
- (a) be present during any deliberation of the Board for the purpose of making the determination, or
  - (b) take part in the making by the Board of the determination.
- (6) A member who is or was:
- (a) a member of a professional association, or
  - (b) an accredited certifier, or
  - (c) an officer of a local council,
- does not, by reason only of that fact, hold a direct or indirect pecuniary interest in a matter for the purposes of this clause.
- (7) A contravention of this clause does not invalidate any decision of the Board.
- (8) This clause applies to a member of a committee of the Board and the committee in the same way as it applies to a member of the Board and the Board.
- (9) For the purposes of this clause (but subject to subclause (6)), a person has a direct or indirect pecuniary interest in a matter if there is a reasonable likelihood or expectation of appreciable financial gain or loss to the person, or to a person to whom he or she is related (within the meaning of section 68), but does not have such an interest in the matter if the interest is so remote or insignificant that it could not reasonably be regarded as likely to influence any decision the person might make in relation to the matter.

#### **11 Effect of certain other Acts**

- (1) Chapter 2 of the *Public Sector Employment and Management Act 2002* does not apply to or in respect of the appointment of a member.
- (2) If by or under any Act provision is made:
- (a) requiring a person who is the holder of a specified office to devote the whole of his or her time to the duties of that office, or
  - (b) prohibiting the person from engaging in employment outside the duties of that office,
- the provision does not operate to disqualify the person from holding that office and also the office of a member or from accepting and retaining any remuneration payable to the person under this Act as a member.

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## **Part 3 Procedure**

### **12 General procedure**

- (1) The procedure for the calling of meetings of the Board and for the conduct of business at those meetings is, subject to this Act and the regulations, to be as determined by the Board.
- (2) The Board is to determine when and how often the Board is to meet for the purposes of carrying out its functions.

### **13 Quorum**

The quorum for a meeting of the Board is a majority of its members for the time being.

### **14 Presiding member**

- (1) The President (or, in the absence of the President, the Deputy President, or in the absence of both the President and the Deputy President, a person elected by the members of the Board who are present at a meeting of the Board) is to preside at a meeting of the Board.
- (2) The presiding member has a deliberative vote and, in the event of an equality of votes, has a second or casting vote.

### **15 Voting**

A decision supported by a majority of the votes cast at a meeting of the Board at which a quorum is present is the decision of the Board.

### **16 Transaction of business outside meetings or by telephone**

- (1) The Board may, if it thinks fit, transact any of its business by the circulation of papers among all the members of the Board for the time being, and a resolution in writing approved in writing by a majority of those members is taken to be a decision of the Board.
- (2) The Board may, if it thinks fit, transact any of its business at a meeting at which members (or some members) participate by telephone, closed-circuit television or other means, but only if any member who speaks on a matter before the meeting can be heard by the other members.
- (3) For the purposes of:
  - (a) the approval of a resolution under subclause (1), or
  - (b) a meeting held in accordance with subclause (2),the President and each member have the same voting rights as they have at an ordinary meeting of the Board.

- (4) A resolution approved under subclause (1) is, subject to the regulations, to be recorded in the minutes of the meetings of the Board.
- (5) Papers may be circulated among the members for the purposes of subclause (1) by facsimile or other transmission of the information in the papers concerned.

**17 Minutes**

The Board must cause full and accurate minutes to be kept of the proceedings of each meeting of the Board.

**18 First meeting**

The Minister may call the first meeting of the Board in such manner as the Minister thinks fit.

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## **Schedule 2    Savings, transitional and other provisions**

(Section 95)

### **Part 1    General**

#### **1    Regulations**

- (1) The regulations may contain provisions of a savings or transitional nature consequent on the enactment of the following Acts:  
this Act
- (2) Any such provision may, if the regulations so provide, take effect from the date of assent to the Act concerned or a later date.
- (3) To the extent to which any such provision takes effect from a date that is earlier than the date of its publication in the Gazette, the provision does not operate so as:
  - (a) to affect, in a manner prejudicial to any person (other than the State or an authority of the State), the rights of that person existing before the date of its publication, or
  - (b) to impose liabilities on any person (other than the State or an authority of the State) in respect of anything done or omitted to be done before the date of its publication.
- (4) The provisions of this Schedule are subject to the regulations.

### **Part 2    Provisions consequent on enactment of this Act**

#### **2    Existing accreditations**

- (1) A person who, immediately before the commencement of this clause, was an accredited certifier within the meaning of the *Environmental Planning and Assessment Act 1979* (as in force immediately before that commencement) is taken to be the holder of a certificate of accreditation under this Act that authorises the person to undertake the same functions as an accredited certifier as the person's accreditation under the *Environmental Planning and Assessment Act 1979* authorised.
- (2) A certificate of accreditation referred to in subclause (1) is subject to the same conditions that applied to the accreditation that was granted under the *Environmental Planning and Assessment Act 1979*.



- (3) Despite subclauses (1) and (2):
- (a) the conditions of any certificate of accreditation taken to have been granted as referred to in this clause may be varied in accordance with this Act, and
  - (b) new conditions may be imposed in accordance with this Act on any such certificate of accreditation, and
  - (c) any such certificate of accreditation may be suspended or cancelled in accordance with this Act.

**3 Pending disciplinary proceedings against accredited certifiers and existing disciplinary findings**

- (1) A complaint against an accredited certifier being dealt with by an accreditation body immediately before the repeal of Division 3 of Part 4B of the *Environmental Planning and Assessment Act 1979* is, subject to the regulations, to continue to be dealt with by the Board as a complaint under Part 3 of this Act.
- (2) Any investigation under Division 1B of Part 6 of the *Environmental Planning and Assessment Act 1979* that was not completed at the repeal of that Division may be continued by the Board under Part 4 of this Act.
- (3) A disciplinary finding (within the meaning of Part 4B of the *Environmental Planning and Assessment Act 1979* as in force immediately before its repeal) against an accredited certifier is taken to be a disciplinary finding within the meaning of Part 3 of this Act.
- (4) Sections 20 (2) and 47 extend to a person who was an accredited certifier within the meaning of the *Environmental Planning and Assessment Act 1979* before the commencement of this subclause.
- (5) An investigation carried out under Division 1B of Part 6 of the *Environmental Planning and Assessment Act 1979* is taken to have been carried out under Part 4 of this Act.

**4 Pending applications for accreditation**

- (1) An application for accreditation as an accredited certifier made under the *Environmental Planning and Assessment Act 1979* before the commencement of this clause but not finally determined before that commencement is taken to have lapsed.
- (2) If the Board considers it appropriate, the Board may, in relation to any application for a certificate of accreditation by a person who made an application that is taken to have lapsed under subclause (1), waive the whole or any part of the fee for making an application for accreditation under this Act.

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**5 Accreditation bodies**

- (1) On the commencement of this clause, an authorisation of a professional association as an accreditation body under the *Environmental Planning and Assessment Act 1979* ceases to have effect.
- (2) No compensation is payable to any person or body because of the operation of this clause.

**6 Accreditation scheme**

- (1) The Minister may, by order published in the Gazette, adopt (whether with or without change) as the first accreditation scheme for the purposes of this Act a document that has been published and publicly exhibited by a government department or statutory authority and that complies with section 4 (2).
- (2) The provisions of section 4 (1) and (4) do not apply to the adoption of an accreditation scheme as referred to in subclause (1).
- (3) An accreditation scheme adopted as referred to in subclause (1) is taken to have been adopted by the Minister in accordance with section 4.

**7 Existing insurance policies**

An insurance policy that:

- (a) was in force immediately before the commencement of this clause, and
- (b) is held by a person who was, immediately before that commencement, an accredited certifier within the meaning of the *Environmental Planning and Assessment Act 1979* (as in force immediately before that commencement), and
- (c) complies with Division 3 of Part 4C of the *Environmental Planning and Assessment Act 1979* (as in force immediately before that commencement),

is taken to comply with the requirements of Division 2 of Part 6 of this Act while that insurance policy remains in force.

**8 Conflicts of interest**

An accredited certifier is not guilty of a contravention of any provision of Division 3 of Part 6 solely because of complying with any term of a contract or other binding arrangement if:

- (a) the contract or arrangement was entered into before the commencement of the provision, and
- (b) complying with that term would not have contravened section 109ZG of the *Environmental Planning and Assessment Act 1979* (as in force immediately before that commencement).

**9 References to accredited certifiers**

A reference in any Act or instrument (other than this Act and the regulations under this Act) to an accredited certifier within the meaning of the *Environmental Planning and Assessment Act 1979* is taken to be a reference to an accredited certifier within the meaning of this Act.

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## Schedule 3 Amendment of Acts and regulation

(Section 96)

### 3.1 Building Professionals Act 2005

**[1] Section 57 Search warrants**

Omit “authorised justice” from section 57 (1) and (2) wherever occurring.

Insert instead “authorised warrants officer”.

**[2] Section 57 (3)**

Omit “Part 3 of the *Search Warrants Act 1985*”.

Insert instead “Division 4 of Part 5 of the *Law Enforcement (Powers and Responsibilities) Act 2002*”.

**[3] Section 57 (4)**

Omit “section 18 of the *Search Warrants Act 1985*”.

Insert instead “section 71 of the *Law Enforcement (Powers and Responsibilities) Act 2002*”.

**[4] Section 57 (5)**

Omit the subsection. Insert instead:

(5) In this section:

*authorised warrants officer* means an authorised officer within the meaning of the *Law Enforcement (Powers and Responsibilities) Act 2002*.

### 3.2 Environmental Planning and Assessment Act 1979 No 203

**[1] Section 4 Definitions**

Omit the definitions of *accreditation body*, *accredited certifier* and *relevant accreditation body* from section 4 (1).

**[2] Section 4 (1)**

Insert in alphabetical order:

*accredited certifier*, in relation to matters of a particular kind, means a person who is the holder of a certificate of accreditation under the *Building Professionals Act 2005* in relation to those matters.

***Building Professionals Board*** means the Building Professionals Board constituted under the *Building Professionals Act 2005*.

**[3] Section 23 Delegation**

Omit section 23 (1A).

**[4] Section 79C Evaluation**

Omit section 79C (4). Insert instead:

**(4) Consent where an accreditation is in force**

A consent authority must not refuse to grant consent to development on the ground that any building product or system relating to the development does not comply with a requirement of the *Building Code of Australia* if the building product or system is accredited in respect of that requirement in accordance with the regulations.

**[5] Section 80A Imposition of conditions**

Insert after section 80A (10):

- (10A) A condition of a consent has no effect to the extent that it requires a compliance certificate to be obtained in respect of any development.

**[6] Section 85 What is a “complying development certificate”?**

Insert after section 85 (5):

- (5A) A complying development certificate has no effect to the extent that it requires a compliance certificate to be obtained in respect of any development.

**[7] Section 85A Process for obtaining complying development certificates**

Omit section 85A (4). Insert instead:

- (4) A council or accredited certifier must not refuse to issue a complying development certificate on the ground that any building product or system relating to the development does not comply with a requirement of the *Building Code of Australia* if the building product or system is accredited in respect of that requirement in accordance with the regulations.

**[8] Section 105 Regulations—Part 4**

Omit “components, processes and designs” from section 105 (3).

Insert instead “building products and systems”.

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**[9] Section 105 (3) (e)**

Omit the paragraph. Insert instead:

- (e) the adoption, application or incorporation (whether with or without modification) of a scheme of accreditation (however described) of building products and systems,

**[10] Section 105 (5) and (6)**

Insert after section 105 (4):

- (5) The regulations may make provision for or with respect to the remission of part of the fees for development applications to the Director-General for payment, in accordance with subsection (6), into the Building Professionals Board Fund established under the *Building Professionals Act 2005*.
- (6) The Director-General is to pay into the Building Professionals Board Fund established under the *Building Professionals Act 2005* such part of the fees for development applications remitted to the Director-General:
  - (a) as may be provided for in the regulations, or
  - (b) subject to the regulations (if any), as the Minister directs to be paid into the Fund.

**[11] Section 109EA**

Omit the section. Insert instead:

**109EA Replacement of principal certifying authorities**

- (1) A person may not be appointed to replace another person as the principal certifying authority for development unless:
  - (a) the Building Professionals Board so approves in writing and the relevant council and consent authority are notified before the replacement occurs, or
  - (b) the current principal certifying authority, the proposed principal certifying authority and the person who appointed the current principal certifying authority agree and the Building Professionals Board and the relevant council and consent authority are notified before the replacement occurs.
- (2) An application to the Building Professionals Board for approval or a notification under subsection (1) is to be accompanied by the fee (if any) prescribed by the regulations under the *Building Professionals Act 2005* and is to be in a form approved by the Board.

**[12] Section 109F Restriction on issue of construction certificates**

Insert after section 109F (1):

- (1A) A construction certificate has no effect if it is issued after the building work or subdivision work to which it relates is physically commenced on the land to which the relevant development consent applies.

**[13] Section 109F (2)**

Omit the subsection. Insert instead:

- (2) A certifying authority must not refuse to issue a construction certificate on the ground that any building product or system relating to the development does not comply with a requirement of the *Building Code of Australia* if the building product or system is accredited in respect of that requirement in accordance with the regulations made for the purposes of Part 4.

**[14] Part 4B Accreditation of certifiers**

Omit the Part.

**[15] Part 4C Liability and insurance**

Omit Division 3.

**[16] Part 6 Implementation and enforcement**

Omit Division 1B.

**[17] Section 148A Improper influence with respect to conduct of accredited certifier acting as certifying authority**

Omit the section.

**[18] Schedule 6 Savings, transitional and other provisions**

Insert at the end of clause 1 (1):

*Building Professionals Act 2005*

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**[19] Schedule 6**

Insert at the end of the Schedule with the appropriate Part and clause numbers:

**Part Building Professionals Act 2005**

**Compliance certificates**

- (1) Section 80A (10A) does not apply to a consent issued before the commencement of the subsection.
- (2) Section 85 (5A) does not apply to a complying development certificate issued before the commencement of the subsection.

**Construction certificates**

Section 109F (1A) does not apply to a construction certificate issued before the commencement of that subsection or in relation to building work or subdivision work that was physically commenced on the land to which the relevant development consent applies before the commencement of that subsection.

**3.3 Environmental Planning and Assessment Regulation 2000**

**[1] Clause 3 Definitions**

Omit paragraph (g) of the definition of *relevant submission period*.

**[2] Clause 103 Notice under section 81A of the Act of appointment of principal certifying authority**

Omit clause 103 (f) (ii).

**[3] Clause 134 Form of complying development certificate**

Omit clause 134 (1) (b) (ii).

**[4] Clause 135 Notice under section 86 of the Act of appointment of principal certifying authority**

Omit clause 135 (f) (ii).

**[5] Clause 138 Compliance certificates**

Omit clause 138 (1) (b) (ii).

**[6] Clause 147 Form of construction certificate**

Omit clause 147 (1) (b) (ii).



**[7] Clause 155 Form of occupation certificate**

Omit clause 155 (1) (b) (ii).

**[8] Clause 162C Progress inspection unavoidably missed**

Omit “accreditation body that accredited” from clause 162C (5).

Insert instead “Building Professionals Board”.

**[9] Part 10 Accreditation bodies and accredited certifiers**

Omit the Part.

**[10] Part 11 Insurance**

Omit the Part.

**[11] Clause 245 What is the maximum fee?**

Insert after clause 245 (2) (h):

- (i) the operational expenses of the Building Professionals Board established under the *Building Professionals Act 2005*.

**[12] Clause 256A Proportion of development application fees to be remitted to Director-General**

Omit “clause 245 (2) (g) and (h)” from clause 256A (1).

Insert instead “clause 245 (2) (g), (h) and (i)”.

**[13] Clause 256A (1A)**

Insert after clause 256A (1):

- (1A) Such part of the amount referred to in subclause (1) as is not directed by the Minister to be paid into the Building Professionals Board Fund under section 105 (6) of the Act is to be applied by the Director-General to the services referred to in clause 245 (2) (g) and (h).

**3.4 Fines Act 1996 No 99**

**Schedule 1 Statutory provisions under which penalty notices issued**

Insert in alphabetical order:

*Building Professionals Act 2005*, section 92

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### **3.5 Law Enforcement (Powers and Responsibilities) Act 2002 No 103**

#### **Schedule 2 Search warrants under other Acts**

Insert in alphabetical order:

*Building Professionals Act 2005*, section 57

### **3.6 Public Finance and Audit Act 1983 No 152**

#### **Schedule 2 Statutory bodies**

Insert in alphabetical order:

Building Professionals Board

### **3.7 Search Warrants Act 1985 No 37**

#### **Section 10 Definitions**

Insert in alphabetical order in the definition of *search warrant*:

section 57 of the *Building Professionals Act 2005*,

### **3.8 Strata Schemes (Freehold Development) Act 1973 No 68**

#### **Sections 37E and 37F**

Omit the sections. Insert instead:

#### **37E Accreditation of certifiers**

- (1) The provisions of Parts 2, 3, 4 and 5 and Divisions 1, 3 and 4 of Part 6 of the *Building Professionals Act 2005*, and the regulations made under that Act for the purposes of those provisions, apply, with any necessary modifications and any modifications prescribed by the regulations, in respect of the following:
  - (a) the appointment and accreditation of accredited certifiers for the purposes of this Act,
  - (b) accredited certifiers,
  - (c) the exercise of functions under this Act by accredited certifiers.
- (2) Without limiting subsection (1), the provisions of the *Building Professionals Act 2005* and the regulations under that Act referred to in that subsection apply to a strata certificate in the same way as those provisions apply to a Part 4A certificate under the *Environmental Planning and Assessment Act 1979*.

**37F Insurance of accredited certifiers**

The provisions of Division 2 of Part 6 of the *Building Professionals Act 2005*, and the regulations made under that Act for the purposes of those provisions, apply, with any necessary modifications and any modifications prescribed by the regulations, to accredited certifiers exercising functions under this Act in the same way that it applies to accredited certifiers exercising the functions of a certifying authority within the meaning of the *Environmental Planning and Assessment Act 1979*.

**3.9 Strata Schemes (Leasehold Development) Act 1986 No 219**

**Sections 66E and 66F**

Omit the sections. Insert instead:

**66E Accreditation of certifiers**

- (1) The provisions of Parts 2, 3, 4 and 5 and Divisions 1, 3 and 4 of Part 6 of the *Building Professionals Act 2005*, and the regulations made under that Act for the purposes of those provisions, apply, with any necessary modifications and any modifications prescribed by the regulations, in respect of the following:
  - (a) the appointment and accreditation of accredited certifiers for the purposes of this Act,
  - (b) accredited certifiers,
  - (c) the exercise of functions under this Act by accredited certifiers.
- (2) Without limiting subsection (1), the provisions of the *Building Professionals Act 2005* and the regulations under that Act referred to in that subsection apply to a strata certificate in the same way as those provisions apply to a Part 4A certificate under the *Environmental Planning and Assessment Act 1979*.

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**66F Insurance of accredited certifiers**

The provisions of Division 2 of Part 6 of the *Building Professionals Act 2005*, and the regulations made under that Act for the purposes of those provisions, apply, with any necessary modifications and any modifications prescribed by the regulations, to accredited certifiers exercising functions under this Act in the same way that it applies to accredited certifiers exercising the functions of a certifying authority within the meaning of the *Environmental Planning and Assessment Act 1979*.

[Second reading speech made in—

Legislative Assembly on 25 May 2005

Legislative Council on 15 November 2005]

BY AUTHORITY