

Passed by both Houses



New South Wales

Building Professionals Amendment Bill 2008

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I certify that this public bill, which originated in the Legislative Assembly, has finally passed the Legislative Council and the Legislative Assembly of New South Wales.

*Clerk of the Legislative Assembly.
Legislative Assembly,
Sydney, , 2008*



New South Wales

Building Professionals Amendment Bill 2008

Act No , 2008

An Act to amend the *Building Professionals Act 2005* in relation to the accreditation of accredited certifiers and other building professionals, the investigation of complaints and the taking of disciplinary action; and for other purposes.

I have examined this bill and find it to correspond in all respects with the bill as finally passed by both Houses.

Assistant Speaker of the Legislative Assembly.

The Legislature of New South Wales enacts:

1 Name of Act

This Act is the *Building Professionals Amendment Act 2008*.

2 Commencement

This Act commences on a day or days to be appointed by proclamation.

3 Amendment of Building Professionals Act 2005 No 115

The *Building Professionals Act 2005* is amended as set out in Schedules 1 and 2.

4 Repeal of Act

- (1) This Act is repealed on the day following the day on which all of the provisions of this Act have commenced.
- (2) The repeal of this Act does not, because of the operation of section 30 of the *Interpretation Act 1987*, affect any amendment made by this Act.

Schedule 1 Principal amendments

(Section 3)

[1] Section 3 Definitions

Omit the definitions of *accredited certifier* and *certificate of accreditation* from section 3 (1).

[2] Section 3 (1)

Insert in alphabetical order:

accreditation holder means the holder of a certificate of accreditation.

accredited body corporate means a body corporate that holds a certificate of corporate accreditation.

accredited certifier means the holder of a certificate of accreditation as an accredited certifier.

accredited certifier director means a person who is an accredited certifier and a director of an accredited body corporate.

building professional means the holder of a certificate of accreditation as a building professional.

certificate of accreditation means a certificate of accreditation issued under this Act and in force.

certificate of corporate accreditation means a certificate of accreditation issued to a body corporate.

certificate of individual accreditation means a certificate of accreditation issued to an individual.

certification work means:

- (a) the determining of an application for any development certificate, or
- (b) the carrying out of the functions of a principal certifying authority under the *Environmental Planning and Assessment Act 1979*, or
- (c) the carrying out of inspections for the purposes of section 109E (3) (d) of that Act.

development certificate means:

- (a) a Part 4A certificate,
- (b) a complying development certificate,

(c) a strata certificate issued under the *Strata Schemes (Freehold Development) Act 1973* or the *Strata Schemes (Leasehold Development) Act 1986*.

professional misconduct has the same meaning as in Part 3.

unsatisfactory professional conduct has the same meaning as in Part 3.

[3] Section 4 Accreditation scheme

Insert after section 4 (9):

(9A) Different accreditation schemes may be prepared under this section in relation to accredited certifiers or building professionals or different classes of accredited certifiers or building professionals.

[4] Section 5 Applications for accreditation

Omit “(other than a body corporate)” from section 5 (1).

[5] Section 5 (1A)

Insert after section 5 (1):

(1A) An application for accreditation to carry out certification work only on behalf of a particular council may not be made except on the recommendation of that council.

[6] Section 5 (3) (b)

Insert “in the case of an applicant who is an individual,” before “that the applicant”.

[7] Section 5 (4)

Insert after section 5 (3):

(4) The regulations may make provision for or with respect to the making of recommendations by councils for the purposes of subsection (1A), including the form and manner of making such recommendations and the matters that are to be taken into account when making any such recommendation.

[8] Section 5A

Insert after section 5:

5A Classes of certificate of accreditation

(1) The Board may issue the following classes of certificate of accreditation:

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- (a) a certificate of corporate accreditation as an accredited certifier which may only be issued to a body corporate that has at least one director who is an accredited certifier and has as directors or employs at least 2 other persons who are accredited certifiers,
 - (b) a certificate of individual accreditation as an accredited certifier which may only be issued to an individual,
 - (c) a certificate of individual accreditation as a building professional which may only be issued to an individual.
- (2) The regulations may provide that different categories of certificate of individual accreditation may be issued by the Board.
 - (3) Without limiting subsection (2), the regulations may prescribe one or more categories of individual accreditation in relation to persons who carry out certification work only on behalf of councils.

[9] Section 6 Determination of application for accreditation

Insert “individual” before “accreditation” where firstly occurring in section 6 (2).

[10] Section 6 (9)–(11)

Insert after section 6 (8):

- (9) Nothing in subsection (8) prevents the Board from determining an application after the expiration of the 60-day period referred to in that subsection.
- (10) A determination pursuant to subsection (9) does not, subject to subsection (11), prejudice or affect the continuance or determination of an application for a review made under section 18 in respect of a determination that is taken by subsection (8) to have been made.
- (11) If a determination pursuant to subsection (9) is made by issuing the relevant certificate of accreditation, the Board is entitled, with the consent of the applicant and without prejudice to costs, to have any application for review (being an application made under section 18 in respect of a determination that is taken by subsection (8) to have been made) withdrawn at any time prior to the determination of that application for review.

[11] Section 6A

Insert after section 6:

6A Accreditation of persons to carry out certification work only on behalf of councils

- (1) When determining an application under section 6 for the issue or renewal of accreditation of a person to carry out certification work only on behalf of a particular council, the Board must not refuse to issue or renew the accreditation on a ground referred to in section 7 (1) (b) or (d) unless the Board has information that gives it reason to believe that it should refuse the application on that ground.
- (2) Nothing in subsection (1) requires the Board to make inquiries to satisfy itself as to any of the matters referred to in section 7 (1) (b) or (d) before granting the application concerned.

[12] Section 7 Grounds for refusal of accreditation

Insert “individual” before “accreditation” where firstly occurring in section 7 (1).

[13] Section 7 (1A)

Insert after section 7 (1):

- (1A) The Board may refuse to issue or renew a certificate of corporate accreditation:
 - (a) if the body corporate concerned does not have at least one director who is an accredited certifier and does not have as directors or employ at least 2 other persons who are accredited certifiers, or
 - (b) if the body corporate does not comply with a requirement under section 5 (3) (a), or
 - (c) if the Board is not satisfied that the body corporate 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 a director of, or a person concerned in the management of, the body corporate is a fit and proper person, or
 - (e) if the body corporate’s equivalent authorisation has been suspended or cancelled (otherwise than at its request) under the law of another jurisdiction, or
 - (f) if the body corporate or a director of, or a person concerned in the management of, the body corporate 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

- (g) if the body corporate or a director of, or a person concerned in the management of, the body corporate has failed to comply with a statutory or other duty, or a contractual obligation, imposed on the body corporate, director or person 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
- (h) if a director of, or a person concerned in the management of, the body corporate is an undischarged bankrupt, or
- (i) if the body corporate is the subject of a winding up order or a controller or administrator has been appointed in respect of it, or
- (j) if the body corporate has represented itself as being an accredited certifier when it was not an accredited certifier, or
- (k) if the body corporate has contravened any code of conduct in the accreditation scheme, or
- (l) for such other reasons as may be prescribed by the regulations.

[14] Section 8 Suspension or cancellation of accreditation

Omit “as an accredited certifier” from section 8 (1).

[15] Section 8 (1) (a)

Insert “in the case of a certificate of individual accreditation,” before “the person”.

[16] Section 8 (2)

Omit “certificate of accreditation as an accredited certifier”.

Insert instead “certificate of individual accreditation”.

[17] Section 8 (2) (b1)

Insert after section 8 (2) (b):

- (b1) it is a condition of the certificate of accreditation that the person may carry out certification work only as an

employee of a particular council and the person has ceased to be so employed or has ceased to be employed in a position that includes the function of carrying out such work, or

[18] Section 8 (2) (g)

Insert at the end of section 8 (2) (f):

, or

- (g) the Board is of the opinion that the person is not a fit and proper person to hold a certificate of accreditation.

[19] Section 8 (2A)

Insert after section 8 (2):

(2A) The Board may suspend or cancel a certificate of corporate accreditation if:

- (a) the body corporate concerned has been issued a certificate of accreditation on the basis of a misrepresentation made by the body corporate, or a person concerned in the management of the body corporate, whether or not made knowingly, or
- (b) the body corporate does not have at least one director who is an accredited certifier or does not have as directors or employ at least 2 other persons who are accredited certifiers, or
- (c) the Board is satisfied that the body corporate is not covered by the insurance required by Division 2 of Part 6, or
- (d) the body corporate's equivalent authorisation has been suspended or cancelled (otherwise than at its request) under the law of another jurisdiction, or
- (e) the Board is of the opinion that a person concerned in the management of the body corporate is not a fit and proper person, or
- (f) a director of, or a person concerned in the management of, the body corporate is an undischarged bankrupt, or
- (g) a disciplinary finding under Part 3 has been made against an accredited certifier director of the body corporate, or
- (h) the body corporate is the subject of a winding up order or a controller or administrator has been appointed in respect of it, or

-
- (i) the body corporate, or an accredited certifier who is a director or employee of the body corporate, has failed to comply with an order of the Board under section 31.

[20] Section 8 (4)

Omit “(2) (c)–(f)”. Insert instead “(2) (c)–(g) or (2A) (d)–(i)”.

[21] Section 11 Register

Omit “category” from section 11 (2) (c).

Insert instead “class and, if applicable, category”.

[22] Section 12 Suspension of accreditation or imposition of conditions to protect the public

Omit section 12 (1). Insert instead:

- (1) The Board may take action under this section if satisfied that:
 - (a) the taking of the action is necessary to protect the safety or property of any person, or
 - (b) an accreditation holder has persistently contravened the provisions of this Act or the *Environmental Planning and Assessment Act 1979* or the regulations under those Acts and is likely to continue to do so, or
 - (c) an accredited certifier has persistently contravened the provisions of the *Strata Schemes (Freehold Development) Act 1973* or the *Strata Schemes (Leasehold Development) Act 1986* or the regulations under those Acts and is likely to continue to do so.

(1A) The Board may do either or both of the following:

- (a) by order suspend the certificate of accreditation of an accreditation holder 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.

[23] Section 15

Omit the section. Insert instead:

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 the complaint about the accreditation holder has not been disposed of.

[24] Section 21 Procedure for making a complaint

Omit “if further particulars are not” in section 21 (4).

Insert instead “until further particulars are”.

[25] Section 21 (5)

Omit the subsection. Insert instead:

- (5) Unless the Board has decided to take no action in relation to the complaint, the Board:
 - (a) must, within 28 days after receiving the complaint or, if the Board has requested further particulars under subsection (3), within 28 days after receiving the requested particulars:
 - (i) inform the accreditation holder of the nature of the complaint, and
 - (ii) by notice, invite the accreditation holder 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 the accreditation holder thinks fit, and
 - (b) may exercise any function under section 48 in relation to the investigation of the complaint.

[26] Section 22

Omit the section. Insert instead:

22 Board may decide to take no action in relation to complaint

- (1) At any time after receiving a complaint, the Board may decide to take no further action in relation to the complaint.
- (2) If the Board decides to take no further action in relation to a complaint, the Board is to:
 - (a) notify the complainant of its decision, and
 - (b) notify the accreditation holder concerned of the fact that a complaint has been made, the nature of the complaint and its decision, and
 - (c) include in the notification to the complainant and the accreditation holder the written reasons for its decision.

[27] Section 29

Omit the section. Insert instead:

29 Report of investigation to be given to accreditation holder

- (1) An authorised officer of the Board investigating a complaint is to prepare a written report 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 accreditation holder concerned.
- (3) An authorised officer is to give a copy of the report to the accreditation holder who is the subject of the complaint with a notice that states that the accreditation holder may make written submissions to the Board within 21 days after the date of the notice.
- (4) After the 21-day period for making submissions has expired:
 - (a) an authorised officer is to give to the Board a copy of the report, and
 - (b) the Board must consider the report taking into account the submissions received within that period.
- (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)).

[28] Section 31 Decision after investigation of complaint

Insert “or professional misconduct” after “unsatisfactory professional conduct” in section 31 (2).

[29] Section 31 (3)

Omit the subsection.

[30] Section 31 (4)

Omit the subsection. Insert instead:

- (4) If the Board is satisfied that the accreditation holder is guilty of unsatisfactory professional conduct or professional misconduct, the Board may take any one or more of the following actions:
 - (a) caution or reprimand the accreditation holder,

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- (b) by order impose such conditions as it considers appropriate on the accreditation holder's certificate of accreditation,
- (c) order that the accreditation holder complete such educational courses as are specified by the Board,
- (d) in the case of an accredited body corporate, order an accredited certifier who is a director or employee of the body corporate to complete such educational courses as are specified by the Board within the time specified by the Board,
- (e) order that the accreditation holder report on his, her or its practice as an accredited certifier or building professional at the times, in the manner and to the persons specified by the Board,
- (f) order the accreditation holder to pay to the Board a fine of an amount, not exceeding 1,000 penalty units, specified in the order,
- (g) order the accreditation holder to pay to the complainant such amount (not exceeding \$20,000) as the Board considers appropriate by way of compensation for any damage suffered by the complainant as a result of the unsatisfactory professional conduct or professional misconduct,
- (h) suspend the accreditation holder's certificate of accreditation for such period as the Board thinks fit,
- (i) cancel the accreditation holder's certificate of accreditation,
- (j) disqualify the accreditation holder from being an accredited certifier director of, or otherwise being involved in the management of, an accredited body corporate or a specified accredited body corporate for such period (including the period of his or her lifetime) as may be specified by the Board,
- (k) in the case of an accredited body corporate, disqualify an accredited certifier director of the body corporate from being an accredited certifier director of, or otherwise involved in the management of, the body corporate for such period (including the period of his or her lifetime) as may be specified by the Board, but only during any period when the body corporate holds a certificate of corporate accreditation,
- (l) order that the accreditation holder 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 Board,

- (m) order that no further action is to be taken by the Board in relation to the complaint if satisfied that the accreditation holder 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 accreditation holder.

[31] Section 34 Tribunal may make certain disciplinary findings

Omit section 34 (2). Insert instead:

- (2) If the Tribunal finds that the accreditation holder is guilty of unsatisfactory professional conduct or professional misconduct, the Tribunal may take any one or more of the following actions:
 - (a) caution or reprimand the accreditation holder,
 - (b) direct that such conditions as it considers appropriate be imposed on the accreditation holder's certificate of accreditation,
 - (c) order that the accreditation holder complete such educational courses as are specified by the Tribunal,
 - (d) in the case of an accredited body corporate, order an accredited certifier who is a director or employee of the body corporate to complete such educational courses as are specified by the Tribunal within the time specified by the Tribunal,
 - (e) order that the accreditation holder report on his, her or its practice as an accredited certifier or building professional at the times, in the manner and to the persons specified by the Tribunal,
 - (f) order the accreditation holder to pay to the Tribunal a fine of an amount, not exceeding 1,000 penalty units, specified in the order,
 - (g) order the accreditation holder 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,
 - (h) suspend the accreditation holder's certificate of accreditation for such period as the Tribunal thinks fit,

- (i) cancel the accreditation holder's certificate of accreditation,
- (j) disqualify the accreditation holder from being an accredited certifier director of, or otherwise being involved in the management of, an accredited body corporate or a specified accredited body corporate for such period (including the period of his or her lifetime) as may be specified by the Tribunal,
- (k) in the case of an accredited body corporate, disqualify an accredited certifier who is a director of the body corporate from being involved in the management of the body corporate for such period (including the period of his or her lifetime) as may be specified by the Tribunal, but only during any period when the body corporate holds a certificate of corporate accreditation,
- (l) order that the accreditation holder 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.

[32] Section 36

Omit the section. Insert instead:

36 Appeals to Appeal Panel against action taken by Tribunal

A decision or finding made, or action taken, 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 decision or finding was made or action taken.

[33] Section 45

Omit the section. Insert instead:

45 Investigation of councils acting as certifying authorities

- (1) The Board may investigate the work and activities of a council in its capacity as a certifying authority.
- (2) The Board may make a decision to undertake an investigation under this section on its own motion or following a complaint relating to the council concerned in its capacity as a certifying authority.
- (3) The Board must prepare a report of the results of any such investigation and 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 satisfied, as a result of an investigation under this section, that an accreditation holder is or may be guilty of unsatisfactory professional conduct or professional misconduct, 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.
- (10) 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.

Note. Section 117B of the *Environmental Planning and Assessment Act 1979* provides for further action that may be taken against a council as a result of an investigation under section 45 of this Act.

[34] Section 46 Investigation of accredited certifiers and building professionals

Omit section 46 (1) and (2). Insert instead:

- (1) The Board may investigate the work and activities of:
 - (a) an accredited certifier in his, her or its capacity as a certifying authority, or
 - (b) an accredited certifier when carrying out certification work on behalf of an accredited body corporate or a council, or

- (c) an accredited certifier director, or
 - (d) a building professional.
- (2) The Board must prepare a report of the results of any such investigation.

[35] Sections 48 (1), 49 (1) and 57 (1)

Insert “or for any purpose in connection with proceedings before the Tribunal on an application or referral under this Act” after “Part 3 or 4” wherever occurring.

[36] Section 60

Omit the section. Insert instead:

60 Record keeping by accreditation holders

- (1) An accreditation holder must, in accordance with the regulations, cause such documents and records to be kept as are prescribed by the regulations.
Maximum penalty: 50 penalty units.
- (2) If the Board requests, by notice in writing served on an accreditation holder, that the accreditation holder provide a copy to the Board of any document or record required to be kept under subsection (1):
 - (a) the accreditation holder must provide a copy of the document or record to the Board within the time specified in the notice, and
 - (b) the accreditation holder must verify any such document or record in the manner, if any, specified in the notice.Maximum penalty: 50 penalty units.
- (3) Without limiting subsection (2), a notice may specify that a document or record is to be verified by statutory declaration.

[37] Section 61 Board to be notified of certain events

Insert after section 61 (3):

- (4) An accredited body corporate must notify the Board in writing of each of the following events within 7 days after becoming aware of the event:
 - (a) if the body corporate ceases to have at least one director who is an accredited certifier,

- (b) if the body corporate ceases to have as directors or employ at least 2 other persons who are accredited certifiers.

Maximum penalty: 50 penalty units.

[38] Section 66 Conflicts of interest

Omit section 66 (3). Insert instead:

- (3) Subsection (1) (d) 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 otherwise than on behalf of the council, but in the course of his or her employment with the council.
- (3A) Subsection (1) (d) does not make it an offence for an accredited certifier employed or engaged by a council to issue a Part 4A certificate or complying development certificate on behalf of the council in relation to development that is to be carried out in the area of the council.

[39] Section 66 (5) and (6)

Insert after section 66 (4):

- (5) Subsection (1) extends to prohibiting an accredited certifier who is a director of or employed by an accredited body corporate from issuing a Part 4A certificate or complying development certificate in circumstances where the body corporate, or another accredited certifier who is a director or employee of the body corporate, would be prohibited from issuing the certificate under that subsection.
- (6) If a director or employee of an accredited body corporate contravenes subsection (1), the body corporate is taken to have also contravened that subsection.

[40] Sections 66A and 66B

Insert after section 66:

66A Limit on income derived from certification work

- (1) An accredited certifier must not obtain income for certification work in respect of development if that income exceeds the limit determined in accordance with the regulations when it is added to

any other income obtained by the accredited certifier for certification work in respect of other development where the same person was involved as the owner, principal contractor or person who engages the principal contractor.

Maximum penalty: 300 penalty units.

- (2) Subsection (1) does not apply to the income that the accredited certifier concerned obtains by carrying out certification work on behalf of a council or as an employee of an accredited body corporate.
- (3) The regulations may make provision for or with respect to the following:
 - (a) the way in which any limit is to be determined for the purposes of subsection (1),
 - (b) without limiting paragraph (a), providing for any such limit to be determined by reference to the total amount of income derived during a specified period,
 - (c) what constitutes income for the purposes of this section,
 - (d) the granting of exemptions by the Board (with or without conditions) from all or any of the provisions of this section or the regulations made for the purposes of this section.

66B Limit on issue of development certificates by employed accredited certifiers

- (1) An accredited certifier who is employed or engaged by a council or is employed by an accredited body corporate must not, in the course of being so employed or engaged, issue more development certificates than the number prescribed by the regulations in respect of development that involves the same owner, principal contractor or person who engages the principal contractor.

Maximum penalty: 300 penalty units.

- (2) The regulations may make provision for or with respect to the following:
 - (a) providing for the number referred to in subsection (1) to be determined by reference to the total number of development certificates issued during a specified period,
 - (b) the granting of exemptions by the Board (with or without conditions) from all or any of the provisions of this section or the regulations made for the purposes of this section.

[41] Part 6, Division 3A

Insert after Division 3 of Part 6:

Division 3A Approval required for certain certification work

71A Accredited certifier to obtain approval before undertaking certain certification work

- (1) An accredited certifier must not, without first obtaining the written approval of the Board, carry out certification work in relation to development of a type prescribed by the regulations if the person for whom the development is carried out, or a contractor or other person carrying out the development, is a prescribed person.
- (2) An accredited certifier must comply with any conditions imposed on the approval by the Board.
- (3) The Board may refuse to grant approval under this section and must refuse in the circumstances prescribed by the regulations.
- (4) A contravention of this section by an accredited certifier is capable of being professional misconduct or unsatisfactory professional conduct.
- (5) Subsection (1) does not require the accredited certifier concerned to obtain the written approval of the Board for the carrying out of certification work as an employee of an accredited body corporate so long as the accredited body corporate has obtained that approval.
- (6) This section does not apply to the following:
 - (a) certification work carried out by an accredited certifier as an employee of a council,
 - (b) certification work of a kind referred to in paragraph (c) of the definition of *certification work* in section 3 (1).
- (7) In this section, *prescribed person* means a person included on a list kept by the Board under section 71B.

71B List of prescribed persons

- (1) The Board may keep a list of prescribed persons for the purposes of section 71A and is to make that list available on request.
- (2) The Board may include a person on the list only in accordance with the regulations.

- (3) The Board must give notice in writing to a person of its intention to include the person on the list.
- (4) The notice must include:
 - (a) the reasons why the Board is of the opinion that the person should be included on the list, and
 - (b) a statement that the person may make submissions to the Board within the period of 14 days after receipt of the notice as to why the person should not be included on the list.
- (5) The Board is to consider any submissions made to it during that 14-day period.
- (6) If, after considering any submissions, the Board determines to include the person on the list, the Board is to give the person notice in writing of its decision.
- (7) The Board may remove a person from the list at any time.
- (8) If the Board removes a person from the list, it must give notice in writing to the person of the person's removal from the list.

71C Exclusion of liability of the State and others

- (1) This section applies to civil proceedings for damages or other compensation brought against the State, the Board, 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.
- (2) No amount of damages or other compensation is payable in any such civil proceedings to the extent that:
 - (a) the claim is made in connection with the exercise of any functions under this Division, and
 - (b) the claim is based on alleged negligence or other breach of duty (including statutory duty) arising because of the exercise of, or the failure to exercise, any function under this Division.

[42] Sections 72–72C

Omit section 72. Insert instead:

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

A person who is the holder of a certificate of individual accreditation must not do any thing that is required by law to be

done by a person with accreditation under this Act unless the person's certificate of accreditation authorises the doing of that thing.

Maximum penalty: 300 penalty units.

72A Responsibilities of accredited certifier directors

- (1) An accredited certifier director of an accredited body corporate must ensure the following in relation to certification work undertaken by the body corporate:
 - (a) that the body corporate complies with the requirements of this and any other Act in the carrying out of the certification work and that appropriate management systems are in place to ensure that the body corporate complies with those requirements,
 - (b) that the certification work is allocated to, and undertaken by, a director or an employee of the body corporate who is the holder of a certificate of accreditation that authorises the holder to carry out that work,
 - (c) that the person for whom the certification work is undertaken is kept informed as to the identity of the individual accredited certifier who is undertaking the work.

Maximum penalty: 300 penalty units.

- (2) An accredited certifier director of an accredited body corporate has a duty to report to the Board any possible unsatisfactory professional conduct or professional misconduct of the body corporate or another director or employee of the body corporate who is an accredited certifier as soon as practicable after becoming aware of the conduct.
- (3) A contravention of subsection (2) by an accredited certifier director is capable of being unsatisfactory professional conduct or professional misconduct.
- (4) If there is more than one accredited certifier director of a body corporate, this section applies equally to each of those directors.

72B Responsibilities of person with individual accreditation acting on behalf of accredited body corporate or council

A person who holds a certificate of individual accreditation and who is a director of, or employed by, an accredited body corporate or a council:

- (a) is not excused from compliance with any of the person's obligations under this or any other Act in relation to any

certification work done by the person on behalf of or in the name of the body corporate or council, and

- (b) is subject to the same requirements in relation to the carrying out of the functions of a certifying authority on behalf of the council or the accredited body corporate as if he or she were the certifying authority.

72C Requirements of accredited body corporate

- (1) An accredited body corporate must ensure that any certification work that is done in the name of or on behalf of the body corporate is done by a director or employee of the body corporate who is the holder of a certificate of individual accreditation that authorises the director or employee to do that certification work.
Maximum penalty: 1,000 penalty units.
- (2) A reference in subsection (1) to certification work that is done in the name of or on behalf of a body corporate includes a reference to certification work done in the name of or on behalf of a council that has engaged the body corporate to undertake that work in its name or on its behalf.
- (3) An accredited body corporate must not undertake any certification work during any period in which it does not have at least one director who is an accredited certifier.
Maximum penalty: 1,000 penalty units.
- (4) If an accredited body corporate has failed, for a continuous period of 3 months, to have as directors or employ at least 3 persons who are accredited certifiers, the accredited body corporate must not undertake any certification work until it has as directors or employs at least 3 persons who are accredited certifiers and has notified the Board in writing of that fact.
Maximum penalty: 1,000 penalty units.

[43] Section 73A

Insert after section 73:

73A Terms of contracts

- (1) The regulations may provide that a contract entered into by an accredited certifier relating to the appointment of the accredited certifier as a principal certifying authority or the carrying out of certification work by the accredited certifier must contain provisions to the effect of those prescribed by the regulations or may not contain provisions to the effect of those prescribed by the regulations.

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- (2) Entering into a contract in contravention of the regulations made for the purposes of this section is capable of being unsatisfactory professional conduct or professional misconduct.
 - (3) This section does not apply to the carrying out of certification work on behalf of a council by an accredited certifier employed by the council.

[44] Part 6A

Insert after Part 6:

Part 6A Requirements relating to councils

74A Responsibilities of councils carrying out certification work

A council must ensure that any certification work of a class prescribed by the regulations that is done in the name of or on behalf of the council is done by an accredited body corporate or an accredited certifier who is the holder of a certificate of individual accreditation that authorises the holder to do that certification work.

Maximum penalty: 1,000 penalty units.

74B Councils to provide certain information and keep certain records

- (1) A council is to provide to the Board such information as is required by the regulations in relation to employees, or persons engaged by the council, who perform certification work on behalf of the council.
- (2) A council is to keep such records as are required by the regulations in relation to certification work carried out on behalf of the council and in relation to employees, or persons engaged by the council, who carry out certification work on behalf of the council.
- (3) The regulations may make provision for or with respect to the following:
 - (a) the provision of information by councils under this section, including when such information is to be provided and the form in which it is to be provided,
 - (b) the keeping of records by councils under this section, including the form in which such records are to be kept and the period for which they are to be kept.

- (4) The Board may keep a register based on any of the information received under this section and may make that register available to the public.

74C Exemptions

- (1) The Board may, with the approval of the Minister, exempt a council by notice in writing given to the council from any of the requirements of this Part or section 109E (1AA) of the *Environmental Planning and Assessment Act 1979*.
- (2) The approval of the Minister under subsection (1):
- (a) may be given in relation to a particular case or a class of cases, and
 - (b) may be subject to conditions, and
 - (c) may be amended from time to time.
- (3) Any exemption given under this section:
- (a) may be limited in time or subject to conditions, or both, and
 - (b) may be revoked by the Board by notice in writing given to the council and must be revoked if the relevant approval of the Minister is no longer in force.

[45] Section 84A

Insert after section 84:

84A Improper influence with respect to conduct of building professional

- (1) A building professional must not 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 for acting in contravention of the *Environmental Planning and Assessment Act 1979* or the regulations under that Act in the exercise of the functions of a building professional.

Maximum penalty: 10,000 penalty units or imprisonment for 2 years, or both.

- (2) A person must not, on an understanding that a building professional will act in contravention of the *Environmental Planning and Assessment Act 1979* or the regulations under that Act in the exercise of the functions of a building professional, give, or offer or agree to give, any benefit of any kind, whether to the building professional or to any other person.

Maximum penalty: 10,000 penalty units or imprisonment for 2 years, or both.

[46] Section 85 False representations

Omit section 85 (1). Insert instead:

- (1) A person who:
- (a) issues a Part 4A certificate or complying development certificate, or a design certificate under section 109IA of the *Environmental Planning and Assessment Act 1979*, that he or she is not authorised by or under this Act or that Act to issue, or
 - (b) makes any statement that the person knows is false or misleading in a material particular in, or in connection with, a certificate referred to in paragraph (a),

is guilty of an offence against this Act.

Maximum penalty: 300 penalty units.

[47] Section 85 (3)

Insert after section 85 (2):

- (3) A person who falsely represents that he or she holds accreditation under this Act that authorises the doing of something under the *Environmental Planning and Assessment Act 1979*, the *Strata Schemes (Freehold Development) Act 1973* or the *Strata Schemes (Leasehold Development) Act 1986* for which such accreditation is required is guilty of an offence.

Maximum penalty: 300 penalty units.

[48] Section 93A

Insert after section 93:

93A Offences by corporations

- (1) If a corporation contravenes, whether by act or omission, any provision of this Act or the regulations, each person who is a director of the corporation or who is concerned in the management of the corporation is taken to have contravened the

same provision if the person knowingly authorised or permitted the contravention.

- (2) A person may be proceeded against and convicted under a provision pursuant to subsection (1) whether or not the corporation has been proceeded against or has been convicted under the provision.
- (3) Nothing in this section affects any liability imposed on a corporation for an offence committed by the corporation under this Act or the regulations.

[49] Section 94 Regulations

Insert after section 94 (2) (h):

- (i) exemptions from all or any of the provisions of this Act or the regulations.

[50] Section 94 (3) and (4)

Insert after section 94 (2):

- (3) A regulation may apply, adopt or incorporate any publication as in force at a particular time or as in force from time to time.
- (4) The regulations may create an offence punishable by a maximum penalty of 50 penalty units.

[51] Schedule 2 Savings, transitional and other provisions

Insert at the end of clause 1 (1):

Building Professionals Amendment Act 2008

[52] Schedule 2, Part 3

Insert after Part 2:

Part 3 Provisions consequent on enactment of Building Professionals Amendment Act 2008

10 Disciplinary provisions

An amendment made by the *Building Professionals Amendment Act 2008* to any provision of Part 3 of this Act does not apply to or in respect of:

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- (a) a complaint if a copy of a report prepared under section 29 on the results of the investigation of the complaint has been given to the person the subject of the complaint before the commencement of that amendment, or
 - (b) any matter arising from a report of the results of an investigation under section 46 if a copy of the report has been given to the person the subject of the complaint before the commencement of that amendment.

Schedule 2 Consequential amendments

(Section 3)

[1] Long title

Omit “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;”.

Insert instead “to provide for the accreditation of certifiers and building professionals for the purposes of the *Environmental Planning and Assessment Act 1979*; to provide for the regulation of accredited certifiers and building professionals and the making of complaints against, and the investigation of, accredited certifiers, building professionals and certifying authorities;”.

[2] Part 2, heading

Insert “and building professionals” after “certifiers”.

[3] Sections 4 (2) (b) and (c), 11 (1), 40 (1), 47 (heading) and 94 (2) (a)

Omit “accredited certifiers” wherever occurring.

Insert instead “accreditation holders”.

[4] Part 2, Division 2, heading and Part 6, heading

Insert “and building professionals” after “certifiers” wherever occurring.

[5] Section 7 (1) (b)

Omit “as an accredited certifier”.

[6] Section 7 (1) (g) and (h)

Insert “, or a building professional,” after “accredited certifier” wherever occurring.

[7] Section 7 (1) (j)

Omit the paragraph. Insert instead:

- (j) if the applicant has represented himself or herself as being an accredited certifier or a building professional when the applicant was not an accredited certifier or a building professional (as the case may be), or

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- [8] Sections 7 (2) (c), 11 (2), 12 (2) (a) and (c), 16, 17(1), 20, 21 (1), 24 (1), 25 (2), 26 (2), 27 (2), (3) and (4), 30 (2) (f), 31 (1), (2) and (5), 32 (1), 34 (1) and (3), 38 (paragraph (a) of the definition of “disciplinary action”), 39 (1) and (2), 44 (1) and (3), 46 (3) and (5), 48 (3), 61, 65 (g), 73, 82 (1) and 91 (a) and Schedule 1 (clause 10 (6) (b))

Omit “accredited certifier” wherever occurring.

Insert instead “accreditation holder”.

[9] **Section 19**

Omit the section. Insert instead:

19 Definitions

- (1) In this Part:

complaint means a complaint about an accreditation holder made under section 21.

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

professional misconduct, in relation to an accreditation holder, means conduct that is unsatisfactory professional conduct of a sufficiently serious nature to justify suspension or cancellation of the accreditation holder’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, the *Environmental Planning and Assessment Act 1979*, the *Strata Schemes (Freehold Development) Act 1973* or the *Strata Schemes (Leasehold Development) Act 1986*, or the regulations under any 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 functions as a certifying authority in a partial manner,
- (f) the wilful disregard by the accredited certifier of matters to which the accredited certifier is required to have regard in exercising 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 conduct specified by a provision of this Act as being capable of being unsatisfactory professional conduct or professional misconduct or any other conduct prescribed by the regulations for the purposes of this definition.

unsatisfactory professional conduct of a building professional means any of the following (whether consisting of an act or omission):

- (a) conduct occurring in connection with the exercise of the building professional's functions 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 building professional,
- (b) a contravention of this Act or the *Environmental Planning and Assessment Act 1979*, or the regulations under either of those Acts, by the building professional, whether or not he or she is prosecuted or convicted for the contravention,

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- (c) a contravention by the building professional 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 a building professional 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 building professional 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 a building professional or the holder of an equivalent authorisation,
 - (e) the wilful disregard by the building professional of matters to which he or she is required to have regard in exercising his or her functions as a building professional,
 - (f) a failure by the building professional to comply with any relevant code of conduct contained in the accreditation scheme,
 - (g) a failure by the building professional to comply with a term or condition of the certificate of accreditation,
 - (h) a failure by the building professional to comply with an order of the Board or the Tribunal under this Act,
 - (i) a failure by the building professional, without reasonable excuse, to comply with a direction or requirement under Part 5,
 - (j) wilfully misleading or obstructing the Board in the exercise of any function under this Part or Part 4 or 5,
 - (k) any other improper or unethical conduct of the building professional that indicates that he or she is unfit to properly carry out the duties of a building professional,
 - (l) any conduct specified by a provision of this Act as being capable of being unsatisfactory professional conduct or professional misconduct or any other conduct prescribed by the regulations for the purposes of this definition.
- (2) A reference in this Part (however expressed) to the exercise by an accredited certifier of the functions of a certifying authority includes a reference to the exercise by the accredited certifier of the functions of a certifying authority on behalf of a council or an accredited body corporate.

- [10] **Sections 21 (1), 61 (1) (e) and 73**
Omit “accredited certifier’s” wherever occurring.
Insert instead “accreditation holder’s”.
- [11] **Section 38 Definitions**
Omit the definition of *accredited certifier*. Insert instead:
accreditation holder includes a former accreditation holder.
- [12] **Part 4, heading**
Insert “and accreditation holders” after “certifying authorities”.
- [13] **Section 62 Application of Division**
Insert “building professionals and” before “such other persons” in section 62 (b).
- [14] **Section 64 Building practitioners**
Omit the definition of *building work* from section 64 (1). Insert instead:
building work includes the design or inspection of building work, the issuing of a Part 4A certificate or complying development certificate in respect of building work and the issue of a design certificate under section 109IA of the *Environmental Planning and Assessment Act 1979*.
- [15] **Section 74 Notice to be given of certain matters**
Omit “his or her” from section 74 (1) (b).
Insert instead “his, her or its”.
- [16] **Section 77**
Omit the section. Insert instead:
77 Functions of Board
The Board has the following functions:
(a) the accreditation of persons for the purposes of the *Environmental Planning and Assessment Act 1979* and the regulations under that Act,
(b) the promotion and maintenance of standards of building and subdivision certification and design in New South Wales,
(c) the investigation of complaints against accreditation holders,

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- (d) the taking of disciplinary action against accreditation holders,
 - (e) the investigation of certifying authorities, accredited certifier directors and building professionals,
 - (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, certifying authorities or building professionals,
 - (g) the review of the accreditation schemes under this Act,
 - (h) the investigation of matters referred to it by the Minister for advice and report in relation to accredited certifiers and building professionals and the accreditation of accredited certifiers and building professionals,
 - (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.