

Building Professionals Amendment Act 2008 No 37

[2008-37]



New South Wales

Status Information

Currency of version

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Provisions in force

Some, but not all, of the provisions displayed in this version of the legislation have commenced.

Notes—

- **Does not include amendments by**
[Statute Law \(Miscellaneous Provisions\) Act \(No 2\) 2011 No 62](#) (not commenced — to commence on 6.1.2012)
- **Proposed repeal**
The Act is to be repealed by sec 4 (1) of this Act on the day following the day on which all of the provisions of this Act have commenced.

Authorisation

This version of the legislation is compiled and maintained in a database of legislation by the Parliamentary Counsel's Office and published on the NSW legislation website, and is certified as the form of that legislation that is correct under section 45C of the [Interpretation Act 1987](#).

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Building Professionals Amendment Act 2008 No 37



New South Wales

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.

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(1) This Act is repealed on the day following the day on which all of the provisions of this Act have commenced.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[1]-[7] (Repealed)

[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:

- (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]-[13] (Repealed)

[14] Section 8 Suspension or cancellation of accreditation

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

[15]-[39] (Repealed)

[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], [43] (Repealed)

[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 1091A of the *Environmental Planning and Assessment Act 1979*, that the person 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]-[52] (Repealed)

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] (Repealed)

[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

[8] (Repealed)

[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,
- (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]-[12] (Repealed)

[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], [16] (Repealed)