



Australian Institute of Building Surveyors

**Australian Institute of Building Surveyors  
(NSW Chapter)**

**Submission on**

**Draft exposure Bills:  
*Environmental Planning & Assessment  
Amendment Bill 2008, and  
Building Professionals Amendment Bill 2008***

**23 April 2008**

Planning Reform  
Department of Planning  
GPO Box 39  
Sydney NSW 2001

The Australian Institute of Building Surveyors (AIBS) welcomes the opportunity to comment on the proposed Bills.

Many provisions of the Bill echo the legislation that existed prior to the introduction of the current legislation.

This submission makes suggestions that will seek to assist in enhancing some of the proposed legislation and make strong comment on what is seen to be bad legislation and not designed in the best interest of an effective system for the community nor in the interest of professionals working in the private and public sectors.

Specific comments are provided in this submission, but it is considered that a more important objective of regulatory reform would be to concentrate on the framework of the development/building industry ensuring that all professions and trades are suitably accredited or registered and held accountable for their actions.

## **RESTRICTIONS ON ACCREDITED CERTIFIERS BUILDING SURVEYING**

The concern with the proposed changes is that there is too great a focus on the accredited certifier, particularly the Principal Certifying Authority (PCA), with increased restrictions and much larger penalties proposed with no rights of appeal.

The opinion is held by many of our members that the role of PCA is the most over regulated profession they know, and they are concerned that their futures are limited due to their duty of care to ensure third parties do the right thing; and that they are the only people on the project with mandatory insurance and that, as such, they will be unlikely to be able to maintain insurance in the near future as a result of the changes.

The current accreditation system for the private sector and proposed for local government can be more expeditiously administered under the Australian Institute of Building Surveyors' scheme that already provides considerable saving to industry through extremely lower fees and eliminates the long hours spent in filling out the extensive yearly returns to the Building Professionals Board (BPB) by the certifier that currently exists.

The development and construction industry is very broad with little or no control over designers (Architecture and Engineering disciplines), developers,

builders, installers and supervisors of work. (Note: Licensed builders only required for residential work up to and including 4 storeys).

The focus is definitely placed upon the PCA to ensure the actions of third parties are correct, which is not practical and is reactionary, not preventative. It is like holding the nearest policeman responsible for somebody driving through a red light and causing an accident, because they didn't prevent the accident.

There should be a much broader focus placed on the development / construction industry and require the registration of all people involved in the design, approval and construction of buildings, and for the installers of key fire safety measures such as fire dampers, sprinklers, etc. which are already identified as essential fire safety measures in the EP&A Act and Regulations.

The response to problems or concerns within the industry of the past 10 years has been to introduce more legislation on the PCA to control the actions of third parties. The reverse should be the case with wide spread accreditation, mandatory insurance and accountability for all, similar to both Queensland and Victoria.

It is noted that recommendation 1 of the Joint Select Committee on the Quality of Buildings, July 2002, recommended the formation of a Building Compliance Commission which registered building and other practitioners including certifiers. The current BPB falls well short of this recommendation in that it is limited in application and is insular in that it is a separate entity from the Building Policy and Legislation and Reform branches of Department of Planning and separate from the Department of Fair Trading Office of Home Building.

## **PROPOSED RESTRICTIONS ON TRADE AND PROFESSIONAL PRACTICE**

The recent Prime Minister's Summit and Council of Australian Governments (COAG) recognises the need to remove state legislation restrictions on trade and professional practice across the state borders.

The proposed NSW State Government's BPB Bill has taken an initial step, and after many years failing to follow the National Accreditation Framework (NAF) and the Australian Building Code Board's (ABCB) recognition of the national levels for Building Surveyors, is to be congratulated. Unfortunately the restrictions that are proposed do not follow NAF levels for the Building Surveying profession and restricts opportunities for Building Surveyors to practice their profession. This is totally unacceptable and falls far short of the principles sought in the Prime Minister's Summit and COAG and represents restrictions upon Building Surveyors to trade and carry out their profession in both the private and local government sectors within New South Wales (NSW) and across the state's borders.

A double jeopardy is imposed on those Building Surveyors employed in local government that is not experienced by other professionals across Australia. The restrictions apply to Grade 3 in restricting employment to local government only and for Grades 2 and 1 it goes even further and prevents professionals at these levels from being employed in any other council other than the one in which they are currently employed. There were similar restrictions when the convicts were farmed out to the early land holders 200 years ago. Will the next step be to restrict Building Surveyors to a single employer in the private sector?

The NAF standard must be accepted by the NSW government for private and local government employment and could start with the initial accreditation of those in local government as they are introduced to accreditation.

The current proposals, if put in place, will no doubt fall apart when challenged by Building Surveyors accredited under NAF rules and registered in other states and then apply under the Mutual Recognition Provisions which requires the BPB to grant accreditation thus permitting them to work in either local government or the private sector.

The Office of Fair Trading has recently moved to eliminate restriction on the trades to move between the states. The proposals under the Building Professional Board (BPB) amendments take us back in the opposite direction.

A large number of Building Surveyors in local government are already nationally accredited and others would satisfy national accreditation on application.

### **BPB DISCIPLINARY POWERS – Council and Accredited Building Surveyors**

The Institute is of the view that the BPB controls for the effective and efficient operation of the scheme by the council as the PCA should be limited to directing the council. The council-employed Building Surveyor is currently responsible for his/her actions to the council and should remain so.

Should there be a failure by an accredited certifier in the exercise of his/her duties, the council should be responsible to take any necessary action. Should council fail to take action, the BPB may then consider appropriate action against the council as the PCA for failing to act.

To place the accredited certifier in the position of being disciplined by two authorities is totally unjust, unacceptable and bad management.

We would also point out that the delegation of the council to exercise its powers under the Act should only be given to an accredited Building Surveyor and in exercising those powers he/she should not be influenced or directed by any person.

## **BPB DISCIPLINARY POWERS – Companies and Accredited Building Surveyors**

The comments above equally apply to private certifying companies. We support the company being the PCA with actions taken against that company which is standard practice for engineering and consultancy based industries.

The proposed system still places full emphasis on the individual certifier as well as the company. This proposal does not allow certifiers to move from company to company without having separate insurance and taking the files with them.

The proposal will not attract any company to seek body corporate accreditation as there are no benefits to staff employed, and a great detriment to the Directors.

### **BUILDING PROFESSIONALS ACT 2005**

#### **1. 5A Classes of Certificate of Accreditation**

It is not understood why a body corporate must have a minimum of three people to obtain corporate accreditation.

We recommend this be reduced to two to cover all types and styles of businesses other than sole practitioners.

We also recommend that the majority of Directors of the company should be accredited certifiers to ensure the governance of the company is in the hands of the certifiers.

#### **2. Section 31 (4)**

This section now does not differentiate between unsatisfactory professional conduct or professional misconduct. Unsatisfactory professional conduct is the lesser of the two offences under the Act, however the penalty could be the same as the more serious professional misconduct charge.

Sub section 31 (4) (g) states the Board may order the accreditation holder to pay compensation to the complainant of up to \$20,000. This is considered inappropriate as the complainant has other civil law rights which they can pursue to recover damages. The concern is that the BPB will be taking on a “Kangaroo Court” role which is not considered to be the role of the BPB.

In addition to the above, it is felt that complainants may complain simply to lodge a monetary claim under the above provision resulting in an influx of vexatious complaints.

Monetary compensation is available and should **only** be available through the courts in accordance with established legal practice and natural justice.

### **3. Section 33 Person may apply to Tribunal for review of disciplinary finding of Board**

The Explanatory Note indicates that the Regulations will contain provisions that a certifier will have no right of appeal unless suspended for more than 12 months or fined the maximum monetary amount (\$110,000).

This is considered a horrendous requirement and does not provide any natural justice for a certifier. A suspension of six months would put most certifiers out of business, and a fine of say even \$10,000 would likely have the same impact. Certifiers employed by Council on fixed salaries would suffer the same fate.

A right of appeal is available on a \$100 parking fine, therefore it is considered that the right of appeal to the Tribunal should not be removed.

In addition to the above, objection is made to the ten-fold increase in the penalty under this Section. It is noted that Queensland and Victoria have similar penalties to the current levels and we believe there should be some consistency between states, as per COAG principles, given the professions are parallel.

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

The proposed amendment is strongly objected to. The Board should ensure that it has all the evidence it needs before making a decision to send a certifier to the Tribunal. Once it is before the Tribunal, any further discovery should be done in accordance with standard legal and civil justice systems.

To ask a certifier to attend a meeting (other than a “without prejudice” meeting to endeavour to resolve the matter) prior to the formal tribunal hearing after being referred to the tribunal, for example, may prejudice the matter before the tribunal, and may corrupt the process of natural justice.

### **5. Section 66A Limit on Income derived from Certification Work**

The concept of limiting income is not understood. If it is to alleviate the perception of a conflict of interest, then this is a flawed argument. The perception of a conflict of interest is something the certifier must take into consideration and must answer the charge if audited.

If a certifier does have a conflict of interest, then the auditors will no doubt take action.

The practical implementation of this clause is considered to be difficult. The paperwork involved in keeping track of fees paid by individual clients, contractors etc is beyond all common accounting packages for small businesses.

Therefore unless a manual system is developed (e.g. spreadsheet) custom software will need to be developed to link contractors to clients etc so that fees derived from one source can be identified.

The other concern is when do you notify the Board? At the beginning of the year, half way through, or when you believe you may breach the maximum? This clause is considered unworkable and unnecessary as other avenues are available to the Board to take action where warranted.

An example is a certifier who does consultancy and some select Construction Certificates (CCs). If they only do three CCs, they are in breach of the Act.

A second example is a certifier in a regional area, where they only have a few builders serving the region.

A third example is a certifier who does a number of smaller developments and has one large project with numerous inspections, where the one project could account for more than 25% of income.

A fourth example is a certifier who takes on a large job at the start of the reporting period and then doesn't get enough work (eg. economic downturn) later in the year to reduce the original contract to 25% of the income.

We believe this is in contravention of Section 52 of the Trade Practices Act, that is, a restriction of trade.

The focus should be on a strong and robust auditing system, based on risk management principles and have resources applied appropriately to the risk areas identified.

## **6. 66B Limit on issue of Development Certificates by employed accredited certifiers**

The comments under Section 66A above equally apply to this clause.

Councils have the same problem where there are only a few builders within their region.

The other concern is that Council certifiers work in "districts" and it is very frequent that a single builder will develop a subdivision as house and land packages. Therefore the district certifier could easily breach this requirement.

The onus is on the certifier to identify the percentage of projects they have done for the one person. There is no requirement or responsibility on the body corporate or council to manage the process. This is the tail wagging the dog.

It should also be noted that Council must accept all applications under the legislation, regardless of number of certifiers or percentages. This will result in a delay until an exemption is obtained.

Again, we believe this is in contravention of Section 52 of the Trade Practices Act, that is, a restriction of trade.

The focus again should be on a strong and robust auditing system, based on risk management principles and have resources applied appropriately to the risk areas identified.

## **7. 71A, 71B Prescribed Persons**

It appears that certain developers, contractors, etc may be placed on a “black list” by the Board, and certifiers may only work for them with approval from the Board. AIBS opposes the concept of a black list and instead individuals or companies should be dealt with on a case by case basis through the judicial process if breaches are alleged.

Clause 71B (i) states that the Board will make the list available upon request. It is considered that, if implemented, the list should be freely available to all certifiers at all times, otherwise the certifier will need to ring the Board prior to issuing every certificate, including the construction and occupation certificate on the same project.

In the case of a prescribed contractor, the PCA may not be aware that person will be working on the project at the time of issuing the CC and becoming the PCA. The owner may employ the prescribed person after the CC is issued, therefore the PCA may not become aware until the project is well under way, therefore breaching this clause.

It is considered that this clause will entrap certifiers who are unaware of the owner’s intentions, and therefore should be removed.

Instead of prescribing persons, the AIBS is in favour of accrediting all persons involved in the development and building industry, and therefore their accreditation can be removed, rather than “prescribing” them and making them the concern of the PCA.

Alleged breaches should be referred to the Department of Fair Trading for action against builders.

## **8. 71C Exclusion of liability of the State and others**

It is not considered that this section will necessarily provide protection to the state or others from commonwealth legislation through the federal system, particularly as it may apply to restriction of trade.

## **9. 73A Terms of Contracts**

The AIBS supports uniform contracts between certifiers and clients, however suggests that the BPB provide clear guidance in the requirements of the

contracts, including matters that must be contained and matters that can not be contained. The rights of parties to tailor contracts must be preserved.

It would seem to be unjust to force a specifically worded contract on parties as this may not provide the full legal protection in all cases putting the parties at financial risk.

#### **10. 84A Improper influence with respect to conduct of building professional**

A building professional's role (as opposed to a certifier's role) will include giving design advice to clients, providing options for compliance including alternative solutions, assessing options, advising on risks with options, advice on the approvals process for each option, and advising the client on a preferred option. The client will choose an option, then the building professional will prepare a report for the approving authority/ies and may attend meetings advocating the merits of the proposal. This is standard industry practice for many consultants including Planners, BCA Consultants and Fire Safety Engineers. This could be considered to be not acting impartially.

This clause would extinguish the ability to carry out cutting edge or innovative design in accordance with standard engineering practice for example.

It is the approval authorities that must act impartially, and "peer review" the designs presented to them. Impartiality is not the test for building professionals acting on behalf of a client. Professional misconduct should cover any necessary circumstances.

The concern is that this process may be seen as the building professional not acting impartially. It is considered that this section is unworkable and should be deleted.

#### **11. Section 109EA (1b)**

The change to delete the requirement to notify the BPB and the council of the replacement of a PCA before the replacement occurs is supported.

However, there needs to be a subclause (c) added that requires notification to the local authority within two days of the replacement occurring as council does need to know who is certifying a particular project to answer any enquiries that may come into council and council's own ability to ensure the DA is complied with.

This is acknowledged in Section 81A when the original PCA is appointed.

## **12. APPENDIX 2**

AIBS supports the accreditation of all building professionals including designers, engineers, installers and supervisors, particularly relating to fire safety measures and their installation.

## **13. Definition of Building Work**

The BPB Act introduces a new definite of “building work” which does not correspond to the definition in the EP&A Act and Regulations.

This will cause considerable confusion and it is recommended that the two acts and regulations use a common definition.

## **ENVIRONMENTAL PLANNING & ASSESSMENT AMENDMENT BILL 2008**

### **1. Schedule 4, Section 80A (10)**

Section (10AB) states where no occupation certificate is issued, a security refund can be given after the date of the first lawful occupation of the building.

Under the provisions of the Act, if an Occupation Certificate is not issued, how can there be lawful occupation. This subclause is confusing and requires better definition.

### **2. 109PA Certifying authorities may apply for advice**

The request to council must be specific as to the matter or matters the certifying authority is seeking advice on from council. Otherwise departures may be hidden and not picked up by the consent authority who may not discover departures without fully detailed assessment. This would be costly and time consuming yet the current requirement requires an answer within 14 days.

Part (2) will require a full final inspection by the council in the currently worded format. Without such an inspection council would not be aware of what changes may have occurred, eg. additional or deleted internal walls, changing unit numbers and format, etc. Is all the parking provided? This would be an exhaustive process.

The clause needs to be amended to provide for only those departures drawn to the attention of the council, otherwise council would need to do full assessments and inspections.

### **3. 118BA Power of authorised persons to require answers and record evidence**

We suggest this clause be omitted, and the normal processes of law that already operate be utilised as it provides a system of natural justice. The BPB can request information from the certifier and if the request is refused, they can then seek a subpoena through the courts to seek the information

### **4. Clause 162A (7A)**

This clause requires the inspection of all walls, floors and ceilings in Class 2 to 9 buildings that have either a fire resistance or sound insulation requirement to be inspected by the PCA or other certifying authority.

The concern is that there will be insufficient certifiers to inspect all walls on all projects. It is agreed that these elements should be inspected, but we consider that 10% audit of walls only should be inspected in line with Wet Area inspections.

The role of the PCA is to carry out a Regulatory Check from time to time, and not to be the Construction Manager or quality assurance officer for the builder. The builder and installer of these items should be accredited and held accountable for their work.

### **5. Clauses 93 and 94 of Regulations**

We believe that the assessment and report for the need to upgrade the building should be carried out by an accredited certifier, building level 1 or 2 (Council or external) or proposed building professional (BCA) acting within their appropriate level of accreditation. The report and evidence of accreditation shall be provided to council regardless of whether the professional is council or external. We request that these clauses be amended accordingly.

### **6. Clause 154D and Clause 260**

Clause 154D proposes a test of ensuring the work carried out is consistent with the Development Approval prior to issuing the occupation certificate. There appears to be no formal mechanism to deal with or authorise works carried out without or not in accordance with the approval.

Clause 260 introduces a fee for Building Certificates for unauthorised works. It appears that it is proposed to use the Building Certificate process for accepting and authorising works. The concern is that the issuing of a Building Certificate does not address development consent or LEP/DCP matters, and does not allow a certifier to issue an occupation certificate.

The AIBS recommends that unauthorised works be dealt with by the submission of a development application to Council. This allows council to assess the application under Section 79 of the Act, which allows consideration

of development and building issues, any reports and certificates provided, and apply relevant conditions if necessary. This process could also be used to authorise the certifier to issue an occupation certificate.

The Institute would be pleased to work with the Department in the interest of further developing the comments contained in this submission.

Kind regards

A handwritten signature in cursive script that reads "Bill Burns".

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