

1998

THE LEGISLATIVE ASSEMBLY FOR THE AUSTRALIAN CAPITAL TERRITORY

CONSTRUCTION PRACTITIONERS REGISTRATION BILL 1998

EXPLANATORY MEMORANDUM

**Circulated by authority of
Brendan Smyth MLA
Minister for Urban Services**

Construction Practitioners Registration Bill 1998

Outline

This is a new Bill. It provides for the registration of construction practitioners who may act as certifiers under the *Building Act 1972* or other legislation if the regulations provide for it. The purpose of the changes is to allow for people not employed by the government ("private certifiers") to undertake plan approval and inspection functions currently undertaken by government employees. The specific functions that registered construction practitioners may undertake depend on the other legislation

The Bill deals with registration requirements, including the qualifications of certifiers and an obligation for them to hold insurance that will allow them to meet their liabilities in the event of a dispute. There will be multiple categories of construction practitioner and each may have separate qualifications and separate functions under other legislation. Registration is renewed if the practitioner makes an annual return and provides evidence that he or she will be insured for the next year.

Compliance auditors will be appointed to check the performance of construction practitioners. They may act in relation to one or more category of construction practitioner. They will not take action themselves but they may provide evidence for disciplinary action.

Disciplinary action may be taken on specified grounds. They include contravention of other legislation that sets out the functions that people registered in a category of construction practitioners can undertake and the conditions under which they may undertake them, or inadequate performance of the construction practitioner's functions under the other legislation. The construction practitioner must be given an opportunity to respond to the case for proposed disciplinary action and an inquiry will normally be held. A range of actions, from recording a reprimand to cancellation of the registration, may then be taken if the grounds are considered to have been established.

The Administrative Appeals Tribunal may review a refusal of registration, suspension of registration pending disciplinary action, refusal of additional time to respond to a disciplinary notice and disciplinary decisions to suspend or cancel registration or to impose a condition on registration or vary an existing condition.

Certifiers assume the liability for the adequacy of building work that goes with powers to approve plans for the building work and inspect and pass work in progress. The provision for certifiers to hold insurance is a way of ensuring that they have resources from which to meet this liability. However to limit the liability to an amount at which insurance premiums are reasonable, a person's liability in building actions is limited to the proportion of the total liability that the court considers appropriate. The period within which a claim may be made is limited to 10 years

from completion of the building work. These provisions follow changes made in other parts of Australia when introducing private certification.

Financial Implications

The number construction practitioners registered is expected to be small and the administrative costs will be met by registration fees. The auditors to be appointed under the Bill will generally be persons performing additional duties under other legislation and the cost of these and other regulatory functions will be met by a fee applied to the construction work.

CLAUSE NOTES

PART I - PRELIMINARY

Formal clauses

Clauses 1 and 2 are formal clauses setting out the short title and commencement of the Bill.

Interpretation

Clause 3 in subclause (1) gives the meaning of references to the terms "certifier", "Code", construction work", "determined fee", "prescribed law", "qualifications" and "registered construction practitioner" used in the Bill.

Subclause 2 of clause 3 allows the regulations to specify the kind of insurance, including professional indemnity insurance or public liability insurance, that must be held by a category of certifiers, the amount of insurance that must be held and a period for which the insurance must cover liability. The period corresponds to that set out in subclause 27 (1). The subclause also requires an insurer to have been approved by the Chief Executive.

PART II - ADMINISTRATION

Division 1 - Registration

Categories of registration

Clause 4 provides for the regulations to set out or describe what categories of registration there are to be.

Application

Clause 5 deals with applications for registration. Subclause 5 (1) requires applications to be made to the Chief Executive.

Subclause 5 (2) states that only individuals, and not companies or partnerships, are to be registered. Applications are to be in writing, signed by the applicant and to state what category of construction practitioner the person is applying for registration.

in. A person may apply for registration in more than one category. Regulations are to prescribe what other information and documents are to be provided with an application for registration. Applicants must pay a fee with the application.

Subclause 5 (3) allows a person previously registered to be exempted from some or all of the requirements of subclause 5 (2) to provide information or documents. This allows a person to apply without providing again data that is already held.

Qualifications

Clause 6 provides for the regulations to set out the qualifications for categories of construction practitioner. The definition of "qualifications" in subclause 3 (1) includes both training and experience.

Determination of applications

Clause 7 describes the process for accepting or refusing an application.

Subclause 7 (1) states that an application must be accepted if it complies with clause 5 on applications, the applicant has the qualifications prescribed under clause 6 on qualifications and there is evidence that the applicant will be covered by insurance for the next twelve months if the application is granted. Evidence of insurance may therefore be provided after the applicant is assessed as otherwise acceptable. If a person applies for registration in more than one category of practitioner, the application must be considered separately for each category.

Subclause 7 (2) deals with refusals. If further inquiries do not establish that the person is eligible under the preceding subclause, the application must be refused. If a person has applied for registration in more than one category of practitioner, the application must be considered separately for each category.

Subclause 7 (3) allows the applicant to be asked to provide further information or documents. The information must be provided within a reasonable time. This allows applicants whose eligibility is unclear to be given the opportunity to strengthen their case and this further information must be provided within a reasonable time.

Entitlement to act as certifier

Clause 8 deals with the eligibility of registered construction practitioners to act as certifiers under other legislation. Subclause 8 (1) states that they may not perform services as certifiers if they have an interest in the construction work.

Subclause 8 (2) defines an interest as a personal one, or one through a related person, in the land on which the construction work is taking place or will take place, through preparation of designs for the construction work, carrying out the work or a financial interest in the construction or completion of the construction work.

Subclause 8 (3) states that an interest through a related person is one created through kinship, professional, commercial or financial relationships, employment, and the holding of shares or a directorship in a company.

Term of registration

Clause 9 deals with terms of registration. Subclause 9 (1) provides that construction practitioners are not registered while their registration is suspended

Registration ends under subclause 9 (2) if it is surrendered by the practitioner or if registration is cancelled by other provisions of the Bill

Registration ends under subclause 9 (3) if the person becomes insolvent, applies to take benefit of a law for the relief of bankrupt or insolvent debtors, compounds with creditors or makes an assignment of remuneration for the benefit of creditors

Annual statement and fee

Clause 10 provides for the renewal of registration. Subclause 10 (1) requires construction practitioners to renew their registration annually. They must pay a fee and include evidence of holding the required insurance for the next year. The regulations will set out the other details to be provided.

Subclause 10 (2) provides that if this process is not carried out, the practitioner's registration is cancelled.

Subclause 10 (3) states when a construction practitioner's registration has been suspended, failure to renew the registration will cause it to be cancelled.

Register

Clause 11 creates a public register of construction practitioners. Subclause 11 (1) requires the Chief Executive to keep a register of construction practitioners

Subclause 11 (2) states that the information to appear in the register will be details about the registration specified in the regulations or other information considered appropriate by the Chief Executive. The register may be kept in paper or electronic form or another form. Under subclause 11 (3), the place where the register is kept is to be decided by the Chief Executive

Subclause 11 (4) gives the public access to the Register and allows them to make copies of entries during business hours. Subclause 11 (5) allows the information to be made available through access to a copy of the whole Register, or of part of the Register, certified as a correct copy.

Division 2 - Code of Ethics

Code of ethics

Clause 12 deals with the issue of a Code of Ethics for construction practitioners. Subclause 12 (1) provides for the Chief Executive to prepare and issue a Code of Ethics to be observed by construction practitioners and Subclause 12 (2) allows the Chief Executive to change it

Subclause 12 (3) states that the issue and changes must be made by the procedures applying to disallowable instruments under section 10 of the Subordinate Laws Act.

Evidence of Code

Clause 13 specifies a way of identifying for formal purposes what was the content of the Code of Ethics at any particular date. Subclause 13 (1) states that the Chief Executive may certify a copy as being the copy in force during some period or at some date and the copy must then be accepted in proceedings

Subclause 13 (2) states that the signature on certification is to be accepted at face value but it may be proved not to be legitimately signed.

Division 3 - Enforcement

Interpretation

Clause 14 gives the meaning of references to "compliance auditor" in Division 3 of Part II of the Bill.

Compliance auditors

Clause 15 provides for the appointment of compliance auditors. Subclause 15 (1) requires there to be at least one compliance auditor

Subclause 15 (2) states that there must be at least one government position whose duty statement includes acting as compliance auditor.

Subclause 15 (3) makes a public servant holding a position described in the previous subclause a compliance auditor.

Subclause 15 (4) provides that compliance auditors' range of activity may be limited by administrative directions.

Identity cards

Clause 16 deals with identity cards for compliance auditors. Subclause 16 (1) requires compliance auditors to be issued with identity cards and produce them on request. Subclause 16 (2) states that people who are no longer compliance auditors must hand in their cards.

A penalty of 1 penalty unit is provided for contravention of this provision.

Power of compliance auditors

Clause 17 sets out the powers of compliance auditors to enter premises and check a construction practitioner's records. Subclause 17 (1) states that while carrying out their functions they may enter premises, but not residential premises, used by a

registered construction practitioner and may have reasonable assistance if necessary. The right of entry applies only during business hours

Subclause 17 (2) provides that the occupier of premises or a person in charge of premises that a compliance auditor enters may require the compliance auditor to show his or her identity card or leave the premises

Subclause 17 (3) allows the compliance auditor to inspect books, documents, plans, drawings or records connected to functions conferred on the construction practitioner under other legislation, make copies of part or all of them, and require a person in charge of the premises to produce them or to provide access to a computer that contains relevant information and print that information

Subclause 17 (4) requires the occupier or person in charge of premises to provide the compliance auditor with reasonable facilities and assistance that will allow the compliance auditor to act effectively under the powers set out in this clause

Obstruction of compliance auditors

Clause 18 makes it an offence, unless there is reasonable excuse, to obstruct or hinder a compliance auditor in the course of the auditor's duties or to fail to comply with the requirements described in subclause 17 (3). These requirements are to provide access to certain classes of records and to allow the making of copies or prints.

A penalty of 50 penalty units or imprisonment for six months, or both of these, is provided for contravention of these provisions.

PART III - DISCIPLINARY PROVISIONS

Interpretation

Clause 19 gives the meaning of references to "disciplinary notice" in Part III of the Bill.

Notice of intended disciplinary action

Clause 20 sets out the grounds on which a construction practitioner can be asked to show cause why disciplinary action should not be taken against him or her. They are:

- (a) registration made in error or on the basis of false or misleading information provided by the registered construction practitioner or on behalf of the construction practitioner;
- (b) failure to comply with conditions added to the construction practitioner's registration as a result of earlier disciplinary action;
- (c) failure to comply with requirements of the Bill or of the Building Act 1972 or another law prescribed by the regulations;

- (d) failure to act with due skill, care or diligence in carrying out functions as a certifier under the Building Act 1972 or another law prescribed by the regulations; and
- (e) failure to comply with a provision of the Code of Ethics provided for in clause 12.

Preliminary suspension of registration

Clause 21 allows the preliminary suspension of registration. Subclause 21 (1) provides for the preliminary suspension of a construction practitioner's registration, if it is considered in the public interest. The decision will depend on the circumstances that lead to the decision to issue a disciplinary notice.

Subclause 21 (2) states that the suspension may take place without previous notice to anyone. This includes not only the construction practitioner but also persons with an interest in work that the practitioner has functions in relation to. Preliminary suspension may take place when the disciplinary notice is served or at any later time before the making of a decision on the disciplinary action, as provided for in subclause 22 (9).

Under subclause 21 (3), the suspension lasts until the practitioner is notified of the decision taken about disciplinary action.

Procedure

Clause 22 deals with the procedure for disciplinary notices. Subclause 22 (1) provides that a notice must give full details of the facts or circumstances leading to the view that there are grounds, specified in the notice, for disciplinary action.

A disciplinary notice must allow a construction practitioner a period of 14 to 28 days to respond showing cause why his or her registration should not be suspended or cancelled. The period is shorter, seven to 14 days, if the construction practitioner's registration has been suspended under clause 21 pending a decision under this clause.

Subclause 22 (2) states that the construction practitioner may ask for additional time and subclause 22 (3) allows the practitioner to be given up to an additional 28 days. Under subclause 22 (4), a request for additional time may be accepted even if it is made after the period initially set for the response has expired.

Subclause 22 (5) provides that after the end of the period for response, including any extension of the period originally allowed in the disciplinary notice, the Chief Executive may set a time and place for an inquiry into the proposed suspension or cancellation of registration. Notice of the inquiry must be given to the construction practitioner and to anyone who made representations about the suspension or cancellation.

Subclause 22 (6) states that if, after an inquiry, any of the grounds for action specified in the disciplinary notice is considered well-founded, any one of the following actions may be taken:

- (a) the registration may be cancelled,
- (b) the registration may be suspended for a period of time,
- (c) however, if the person is registered in more than one category, the suspension or cancellation need not apply to all categories of registration,
- (d) a condition may be added to the registration or an existing condition varied,
- (e) the construction practitioner may be required to successfully undertake a course of training;
- (f) the construction practitioner may be asked to report on some of his or her activities as a practitioner, in addition to the notification requirements that are part of the practitioner's functions under other legislation;
- (g) the construction practitioner may be reprimanded

Subclause 22 (7) allows any of these disciplinary actions to be taken if the construction practitioner does not reply to the disciplinary notice

Subclause 22 (8) requires the construction practitioner and anyone else who made representations about the disciplinary action must be informed in writing of the decision.

Subclause 22 (9) states that disciplinary action takes effect on the day when the construction practitioner is informed of the decision.

Notification of decision

Clause 23 deals with notification of a disciplinary decision. Subclause 23 (1) requires certain details of a decision on disciplinary action that affects registration to be published in an ACT daily newspaper

Subclause 23 (2) states that the details referred to in the previous subclause are the name of the person, any other name under which the person is known to have been carrying on business as a construction practitioner, the person's business address, the nature of the disciplinary action, the date on which suspension or cancellation took place and the grounds for the decision

Subclause 23 (3) provides that a notice is not to be published until any review or appeal has been unsuccessful or withdrawn, or until the time for review or appeal has passed without an application for review, or an appeal, being made

Removal of condition

Clause 24 establishes a procedure for the removal of any condition that has been imposed on registration as a result of disciplinary action. Subclause 24 (1) allows a construction practitioner to apply for removal of a condition that has been imposed on his or her registration under sub-subclause 22 (6) (a) (v)

Subclause 24 (2) allows the Chief Executive to remove the condition

PART IV - LIMITATION OF LIABILITY

Interpretation

Clause 25 gives definitions of the meaning of references to "building action", "building approval" and "building work" in Part III of the Bill.

Limitation of liability of persons jointly or severally liable

Clause 26 limits joint and several liability for building work. Subclause 26 (1) states that when a court determines damages in a building action, it must give judgement against each defendant who is found liable for a proportion of the total damages. The proportion is to be what the court considers just in view of the person's responsibility for the loss or damage.

Subclause 26 (2) then limits the person's liability to the amount for which judgement was given. The contrary effect of other Acts or rules of law is excluded. The definition of "building action" in clause 25 excludes an action over death or personal injury from this limitation.

Subclause 26 (3) states that a person found liable under the first subclause of this clause is not liable to contribute to the damages apportioned to anyone else in the action or to indemnify them in respect of the damages.

Limitation on the time when building action may be brought

Clause 27 limits the time when a building action may be brought. Subclause 27 (1) states that the period is 10 years from the issue of a certificate of occupancy. If no certificate is issued, the period is ten years from the date of the last inspection and if there has been no inspection, the period is ten years from the date when the building was first occupied or used..

Subclause 27 (2) gives the meaning of references to certificate of occupancy" in this section. It is a certificate issued under section 53 of the Building Act 1972, a section which deals with the issue of certificates of occupancy and use.

PART V - MISCELLANEOUS

Review of decisions

Clause 28 deals with the review of decisions. Subclause 28 (1) sets out the decisions under the Bill that may be reviewed by the Administrative Appeals Tribunal. They are refusal of an application for registration, preliminary suspension of registration, refusal of additional time to show cause when a disciplinary notice has been issued, suspension or cancellation of registration as part of disciplinary action, including cancellation or suspension of registration in particular categories when the construction practitioner is registered in more than one category, and imposing or varying a condition on registration as a result of disciplinary action.

Subclause 28 (2) states that notice of reviewable decisions must be in writing and subclause 28 (3) specifies that the notice must provide the kinds of information

about review that are specified in the Code of Practice made under subsection 25B (1) of the Administrative Appeals Tribunal Act 1989

Cancellation of insurance

Clause 29 states that, if a registered construction practitioner has insurance that is required by the Bill and an insurer cancels that insurance, the insurer must provide notice to the Chief Executive within three days

Power of Minister to determine fees

Clause 30 allows the Minister to determine fees or determine a formula by which fees under the Bill are calculated and requires the Minister to do so in an instrument published in the Gazette.

Regulations

Clause 31 deals with regulations. Subclause 31 (1) allows the making of regulations under the Bill. Subclause 31 (2) sets out the purposes for which regulations may be made under the Bill. They include but are not limited to:

- (a) specifying acceptable insurers for a category of registration - see subclause 3 (2),
- (b) specifying the amount, or minimum amount, of insurance cover to be held for a category of registration; a practitioner registered in more than one category may be required to hold separate insurance for each category - see subclause 3 (2),
- (c) specifying the excess, or maximum excess, that applies to the insurance cover to be held for a category of registration; and the circumstances in which the amount may be varied - see subclause 3 (2)
- (d) specifying other terms or conditions for the insurance - see subclause 3 (2);
- (e) setting out the kind of information to be provided with applications for renewal of registration - see clause 10; and
- (f) making penalties of up to 10 penalty units for offences against the regulations

Amendments of the Law Reform (Miscellaneous Provisions) Act 1955

Clause 32 adds a subsection to section 13 of the Law Reform (Miscellaneous Provisions) Act 1955. The proposed **new subsection 13 (2)** states that "the Part has effect subject to Part IV of the Construction Practitioners Registration Act 1998"

"Part" here means Part IV of the Law Reform (Miscellaneous Provisions) Act 1955. It deals with proceedings against and contribution between tort-feasors. Within that Part, section 13 deals with exemptions. This addition provides a cross reference between the position for other purposes and the limitations introduced by the Bill for building actions.