

EXPLANATORY MEMORANDUM

LOCAL GOVERNMENT (MISCELLANEOUS PROVISIONS) AMENDMENT BILL 2005

INTRODUCTION

The proposed changes in this Bill are to the *Local Government (Miscellaneous Provisions) Act 1960* (the Act) and include:

- some amendments carried over from the *Local Government (Miscellaneous Provisions) Amendment Bill 2003* (the 2003 Bill) which lapsed on 23 January 2005;
- some revised amendments based on provisions in the 2003 Bill; and
- other changes not contemplated in the 2003 Bill.

Main changes between the 2003 Bill and this Bill

The main changes between the 2003 Bill and this Bill are outlined below.

Retrospective building approvals

The 2003 Bill provided that a local government could retrospectively issue a “certificate of substantial compliance” in relation to unauthorised building work, if satisfied with the standard of construction. This Bill provides that a “building approval certificate” may be issued in relation to unauthorised building work, if the local government is satisfied that the unauthorised building work substantially conforms to the requirements of the Act. The reasons for this change being that the approach taken in this Bill of issuing a “building approval certificate” will:

- have less potential for creating liability for local governments than through the a “certificate of substantial compliance”;
- more closely align with the existing process for building licences; and
- ensure that a person carrying out unapproved building work will not be able to evade paying the fee payable under section 4B of the *Builders’ Registration Act* and the Building and Construction Industry Training Fund levy, as well as any penalty for late payment of that levy payable under section 24 of the *Building and Construction Industry Training Levy Act 1990*.

HII Insurance

Approval of unauthorised building work also raises the issue of the protection of consumers through home indemnity insurance. Prior to issuing a prospective building licence the local authority confirms that, where required, home indemnity insurance, paid separately by the builder, is in place.

Under the proposed changes in this Bill, a building approval certificate may be issued subject to certain conditions specified in it. These may include a requirement on the owner to take all reasonable steps to ensure a home indemnity insurance policy or corresponding cover in relation to the unauthorised building work is obtained, on reasonable terms. This condition may be applied where:

- the owner has identified on the building approval certificate application form a registered builder as being the person who constructed the building (the registered builder would be required to obtain the cover at the request of the owner); and
- the age of the building is such that home indemnity insurance or corresponding cover would still be current had a building licence been properly issued.

Advice prior to issue of building licences and approvals

This Bill provides that where a local government does not delegate to its building surveyor authority to approve or refuse particular plans and specification or unauthorised building work, a local government may only issue a building licence or building approval certificate when it has received advice from an appropriately qualified building surveyor. However, the building surveyor providing the advice need not be employed by the local authority, but may be on contract, or engaged by the building owner for the purposes of the application. The reason for this requirement being included in this Bill is that under current provisions, a local government is not obliged to obtain advice from a building surveyor before issuing a building licence and buildings could be approved without proper scrutiny. By allowing for advice from any appropriately qualified person, the Bill provides considerable flexibility to local governments and building owners to streamline approvals and avoid delays. This requirement was not included in the 2003 Bill.

Miscellaneous Amendments

This Bill also contains a number of miscellaneous amendments not included in the 2003 Bill. These include:

- upgrading the penalties for building without a licence and occupying or allowing an unauthorised building to be occupied;
- clarifying that the definition of swimming pool includes a spa-pool;
- clarifying a right of review as to conditions imposed on building licences; and
- various minor miscellaneous amendments.

Notes

The *Local Government (Miscellaneous Provisions) Act 1960* consists of those parts of the *Local Government Act 1960* that were not repealed by the passage of the *Local Government Act 1995*.

References in the clause notes below to “repealed” sections include references to sections repealed by the *Local Government Act 1995* (No. 74 of 1995) which continue to have effect under Schedule 9.2 clause 4(2) of that Act. These “repealed” sections do not appear in printed versions of the Act. This Bill reinstates the relevant provisions contained in these “repealed” sections (157(2), 159 and 160) into the *Local Government (Miscellaneous Provisions) Act 1960*. The continuing effect of Schedule 9.2 clause 4(2) will cease on the day clause 13 of this Bill comes into operation.

Where proposed new sections reflect repealed sections, certain references have been updated. For instance, various references to “council” and “municipality” have been replaced with references to “local government”.

CLAUSE NOTES

CLAUSE 1. SHORT TITLE

Clause 1 provides that the name of this Bill when enacted is the *Local Government (Miscellaneous Provisions) Amendment Act 2005*.

CLAUSE 2. COMMENCEMENT

Subclause (1) provides that the Act is to come into operation on the day it is proclaimed.

Subclause (2) allows for different dates to be set for certain provisions to commence.

CLAUSE 3. THE ACT AMENDED

Clause 3 identifies the Act that is being amended by this Bill.

CLAUSE 4. SECTION 245A AMENDED

This clause amends section 245A(1) by clarifying the intent of the Act by amending the definition of “swimming pool” to include a spa-pool (whether or not it is inside or outside a dwelling), but to not include a spa-bath. The obvious difference and the concern being that a spa-bath is usually drained after use but a spa-pool is usually left full, creating a dangerous hazard for small children. While most local governments enforce this provision on the common understanding that a spa-pool (as opposed to a spa bath) is included in the definition, this should be made clear in the legislation.

CLAUSE 5. PART XV DIVISION 1A INSERTED

This clause inserts –

Division 1A – Qualifications and appointment of local government building surveyors

Section 373A. Qualifications of local government building surveyors

Subsection (1) reflects repealed section 159(a). The words (appointed to the office of building surveyor) “of a local government” have been added to

make clear this refers to a building surveyor employed by a local government.

Subsection (2) provides a head of power for regulations to be made for the purposes of setting the qualifications required to be appointed to the office of building surveyor of a local government and allow for a committee established under Section 374AAB(3)(b) to assess qualifications of applicants and issue certificates of qualification for the purposes of appointing a person to the office of building surveyor of a local government.

Section 373B Appointment of local government building surveyors

Subsections (1) and (2) reflect repealed section 157(2)(b).

Subsection (3) reflects repealed section 160(2).

Subsection (4) reflects repealed section 160(2aa). Read in conjunction with section 373AAB(4), this means that a delegation by a local government to a person who is appointed to the office of building surveyor with the local government temporarily for a period or 3 months or less will not be effective if the person does not have the appropriate qualifications.

Subsection (5) reflects repealed section 160(2a).

Subsection (6) reflects repealed section 160(2b).

Subsection (7) reflects repealed section 160(2c). These provisions apply despite anything in the principal Act or the *Local Government Act 1995* (this reflects a similar provision in existing section 160(2d)).

Subsection (8) reflects repealed section 160(3). This subsection provides that a person occupying the office of building surveyor of a local government cannot be removed from that office as a result of any regulations made under these proposed changes just because he or she does not hold a certificate of qualification.

Subsection (9) reflects repealed section 160(4). This subsection means that, subject to any final transitional regulations regarding delegations which may at some time in the future be made following the consultation mentioned previously, a person occupying the office of building surveyor of a local government may continue to perform the functions of that office.

CLAUSE 6. SECTION 374 AMENDED

Subclause (1) increases the maximum and daily penalties in section 374(1) for building without a licence to more accurately reflect the seriousness of the

offence. This penalty reflects that in section 27 of the *Town Planning and Development Act 1928*, which applies in relation to subdivision of land without approval of plans. It is considered this provides a comparable offence, with a \$50 000 penalty and a daily penalty of \$5 000 for a continuing contravention. The deletion of the existing minimum penalty and minimum daily penalty provides discretion as to whether any penalty should be awarded in the case of a conviction.

Subclause (2) repeals existing sections 374(1b), (1ba), (1c), (1d) and (2), which relate to delegation of authority to approve or refuse plans and specifications by a local government to a person appointed to the office of building surveyor. The relevant provisions in these sections will be replaced by proposed new sections 374AAB(1), 374AAB(5), 374AAB(8) and 374AAB(9).

Subclause (2) also inserts the following new subsections –

Subsection (1b) provides a local government discretion to reject a building licence application to amend, alter, extend or enlarge a building already erected if the building requires alterations, should be pulled down and/or comprises unauthorised building work. The local government may also at this point issue an alteration or pull down notice under section 401(1) or an invitation to the owner to apply for the issue of a building approval certificate under proposed new section 401(1a)(c) (refer clause 11(2)). In the case of rejection due simply to unauthorised building work that substantially conforms to the requirements of the principal Act, the applicant would need to apply for a building approval certificate. Such certificate would need to be issued by the local government prior to any consideration being given to the building licence application.

Subsection (1c) allows a local government to suspend consideration of the abovementioned building licence application until an application for a building approval certificate has been decided.

Subsection (1d) gives a local government a discretion to require a person issued with a building licence to notify the local government within a specified time (but not less 35 days of the practical completion of the building work) that the building work is completed. This requirement would be included as a condition imposed on the building licence. This allows the local government to monitor specific building works and finalise the currency of a building licence.

Subsection (2) provides a penalty that applies to a breach of the above requirement.

Subclause (3) increases the penalty provision in section 374(3) for occupying or using or permitting a person to occupy or use an unapproved building to more

accurately reflect the seriousness of the offence. The tenfold increase reflects the proposed tenfold increase in the penalty for building without a licence.

Subclause (4) inserts new subsection (4) in section 374. This subsection provides a defence to a person that might have otherwise committed an offence by occupying or using or permitting a person to occupy or use an unauthorised building or part of it if the person has, prior to the occupation or use, obtained a building approval certificate for the unapproved building work. This amendment is based on a provision in the 2003 Bill, substituting “building approval certificate” for “certificate of substantial compliance”.

CLAUSE 7. SECTIONS 374AA, 374AAB, 374AAC AND 374AAD INSERTED

This clause inserts after section 374 –

Section 374AA. Building approval certificates for unauthorised building work

New section 374AA describes the circumstances in which an owner of unauthorised building work may make an application to a local government for a ‘building approval certificate’, the way in which the application is to be made, and the powers of the local government to approve or refuse to approve such applications. These provisions are based on provisions in the 2003 Bill, substituting “building approval certificate” for “certificate of substantial compliance”.

Subsections (2) and (3) provide that the owner of unauthorised building work may make an application to the local government for a ‘building approval certificate’ using the prescribed form accompanied by the necessary documentation and the prescribed fee.

Subsections (4) and (5) provide that the local government may, on receipt of an application for a ‘building approval certificate’, and if satisfied with the standard of construction, either issue the certificate, or issue the certificate with conditions, or refuse to issue the certificate.

Section (6) provides that an application for a ‘building approval certificate’ may be considered as if it were an application for a building licence in that if the applicant has not been advised of a decision to approve or refuse to approve the specifications and plan within 35 days of their submission, the applicant may require by written notification to the local government’s chief executive officer a decision within 14 days. If the chief executive officer does not do so within that time, the local government is deemed to have refused.

Section 374AAB. Delegation of authority to approve plans of buildings or unauthorised building work

Subsection (1) reflects existing section 374(1b) except that:

- it also provides for delegation of the power to approve unauthorised building work; and
- refers to *a person* who may receive the delegation (the existing provision refers to a person appointed to the office of building surveyor). Subsection (2) limits to whom the delegation may be made.

Subsection (2) reflects a provision from the 2003 Bill. It provides a local government with the flexibility to delegate to a person that the regulations say may receive delegated authority. It is intended that the regulations will however limit the persons to whom a delegation may be made by reference to the relationship that they have to the local government and the applicant. The regulations will provide the delegation may be made to a person employed by the local government or engaged by the local government for the purposes of approving or refusing to approve plans and specifications, but cannot be a person who is engaged by the applicant for the purposes of the application. This approach will serve to meet the State's National Competition Policy obligations in this area.

Subsection (3) further enables the regulation of the delegation of authority through provisions outlined below. These provisions partly reflect those in repealed section 159, except that these new provisions relate to the delegation of authority, whereas repealed section 159 relates to qualifications of (local government) officers.

Paragraph (a) reflects a provision in the 2003 Bill. It provides for prescribing the educational and professional qualifications, if any, and qualification certificates necessary (if required) to be held by a person before the authority to approve, or refuse to approve, plans and specifications or unauthorized building work is delegated to that person.

Regulations issued under this provision will allow for the introduction of nationally consistent building surveyor qualifications in accordance with mutual recognition principles.

Paragraph (b) partly reflects paragraphs (b) and (c) of repealed section 159 by providing for the constitution of a committee to assess qualifications of applicants and issue certificates of qualification if satisfied that the applicant has:

(i) the required qualifications or an equivalent qualification obtained outside of this State (the *Mutual Recognition Act 1992* of the Commonwealth, adopted by WA under the *Mutual Recognition (Western Australia Act 2001)*, applies in respect of the registration of a person in an occupation in another State or the ACT or the NT);
or

(ii) for certain types of certificates, enough knowledge and experience to enable them to carry out the role of persons who have those certificates.

Paragraph (c) introduces a new provision which gives the committee the option of requiring an applicant to submit for assessment by a third party prior to the committee making its determination. The intent being that while the committee will issue the certificates, it will have the flexibility to assess the applicant itself or take into account an assessment made by a third party.

Paragraph (d) reflects paragraph (d) of repealed section 159.

Paragraph (e) reflects paragraph (e) of repealed section 159. The fee may take into account costs incurred by the committee in relation to a third party engaged by the committee to provide an assessment.

Subsection (4) is based on a provision from the 2003 Bill. This subsection provides that a delegation is ineffective unless the delegate has the educational and professional qualifications, if any, necessary to approve the relevant type of building work.

Subsection (5) reflects existing section 374(1ba).

Subsection (6) precludes delegated authority from being further delegated by a delegate.

Subsection (7) provides that delegated authority is deemed to be exercised in accordance with the delegation, unless otherwise proven.

Subsection (8) reflects existing section 374(1c).

Subsection (9) reflects existing section 374(1d).

SECTION 374AAC. ADVICE TO BE SOUGHT WHERE NO DELEGATION OF AUTHORITY

Subsection (1) provides that, if the decision to approve or refuse to approve plans and specifications or unauthorised building work is to be made by a local government rather than a delegate, the local government cannot make that decision unless it has received and taken into account advice from an appropriately qualified person. To be qualified a person must have at least the same qualifications that would enable the person to receive delegation of authority from that particular local government for the relevant class of building.

The local government will not however be compelled to act on the advice but should record any decision to act against that advice. This is intended to provide a local government with the flexibility to obtain advice from an appropriately qualified building surveyor who is employed by or engaged on contract to the local government, employed by another local government, or employed or engaged by the applicant for the purposes of the application. The local government will have a discretion to disregard advice provided if say, the local government perceives that the person who provided the advice had a conflict of interest. In any case, the local authority may obtain further advice from another appropriately qualified person.

Subsection (2) is self-explanatory.

Subsection (3) provides that the obligation to obtain advice does not apply if the regulations provide that the relevant local government can under the regulations delegate to a person who does not need to hold any qualifications to receive the delegation (under the current regulations, a person appointed to the office of building surveyor in a local government with a population of 15,000 or less does not need to hold any qualifications). As the regulations will provide that a person does not need to hold any qualifications to receive delegation in relation to minor buildings such as pergolas, the obligation to obtain advice will not apply to such buildings.

SECTION 374AAD. REVIEW OF DECISIONS ABOUT BUILDING LICENCES AND BUILDING APPROVAL CERTIFICATES

Subsection (1) provides for review by the State Administrative Tribunal of local government decisions regarding:

- (a) its refusal to approve plans and specifications in support of an application for a building licence – this reflects existing section 374 (2)(a);

- (b) conditions imposed on a building licence – despite the fact that existing review provisions in section 374(2)(a) do not specifically mention reviews of a decision as to a condition specified in a licence issued pursuant to section 374(1a), in the past appeals regarding decisions as to conditions have been allowed. However as there has been some argument as to whether the existing legislation allows for this, it is considered this section should be amended to specifically provide for such reviews;
- (c) its refusal to issue a building approval certificate; or
- (d) conditions imposed on a building approval certificate.

Subsection (2) reflects existing section 374(2)(b).

CLAUSE 8. SECTION 374AA AMENDED

Subclause (1) creates a new subsection (1) in existing section 374AA. Subsection (1) will continue the existing provisions which prevent a local government from issuing a building licence unless satisfied that the person applying, if liable, has paid a Building and Construction Industry Training Fund (BCITF) levy (0.2% of the cost of the works).

Subclause (2) creates a new subsection (2) in existing section 374AA. Subsection (2) prevents a local government from issuing a building approval certificate unless satisfied that the person applying, if liable, has paid a BCITF levy, as well as any penalty for late payment of that levy payable under section 24 of the *Building and Construction Industry Training Levy Act 1990*. This is intended to ensure that if the applicant built without a building licence and would have been liable to pay the BCITF levy, that person cannot evade paying the levy and any late penalty for which the person may be liable.

CLAUSE 9. SECTIONS 374AA AND 374AAA RENUMBERED

This clause renumbers existing sections 374AA (Local government not to issue licence under section 374 or 374A unless levy due on work is paid) and 374AAA (Local government not to issue building licence unless home indemnity insurance held). This is necessary to enable the insertion under clause 7 of proposed new sections 374AA, 374AAB, 374AAC and 374AAD.

CLAUSE 10. SECTION 380(1) AMENDED

This clause amends a reference in section 380(1) to “building surveyor” by adding after that reference the words “of the local government” (for that district). This makes clear that the person being referred to is the person who holds the office of building surveyor in a local government for that district.

CLAUSE 11. SECTION 401 AMENDED

Subclause (1) makes paragraph (b) clearer by separating out the reference to “a contravention of the Act” and placing it in a separate subsection (ba). This clarifies that a contravention of the Act should not necessarily be linked to non-compliance with, or a departure from, approved plans and specifications.

Subclause (2) prevents the local government from serving a pull down or alteration notice in relation to unauthorised building work where the owner has obtained a building approval certificate, or the local government is considering an application for such certificate, or the local government has invited the owner to apply for a building approval certificate, or the owner has lodged an application to the State Administrative Tribunal for the review of a refusal of a local government to issue the certificate.

Subclause (3) clarifies the requirement in section 401(4) on the builder or owner to serve written notice on the local government on completion of the types of building work mentioned only applies where a pull down or alteration notice has been issued pursuant to section 401(1). As currently drafted, this section is unclear as to what circumstances are intended to be covered by the words “whether pursuant to a notice from the local government or not”.

Subclause (4) clarifies that the words “in conformity with the notice” in section 401(5) refer to a pull down or alteration notice issued pursuant to section 401(1). As currently drafted, it is unclear as to what notice the building must conform with in order for the building surveyor of the local government to be satisfied and to issue a certificate.

CLAUSE 12. VARIOUS REFERENCES TO BUILDING SURVEYOR AMENDED

This clause amends references to “building surveyor” in the existing sections of the principal Act mentioned in the Table by adding after that reference the words “of the local government”. These changes and the other references to “building surveyor of a local government” in proposed new sections inserted by this amendment Bill make clear that the person being referred to in the section is the person who holds the office of building surveyor in a local government.

CLAUSE 13. CONSEQUENTIAL AMENDMENT TO THE LOCAL GOVERNMENT ACT 1995 AND TRANSITIONAL PROVISION

Subclause (1) provides that this section amends the *Local Government Act 1995*.

Subclause (2) repeals clause 4(2) of Schedule 9.2 to the *Local Government Act 1995*.

The background to this matter is that clause 4 of Schedule 9.2 to the *Local Government Act 1995* repealed, among other sections, sections 157(2)(b) (Duty and power to appoint officers), 159 (Regulations relating to qualifications of officers) and 160 (Appointments) of the *Local Government Act 1960*. However, clause 4(2) of that same Schedule provides that despite the repeal of these sections, they continue to have effect so far as they relate to building surveyors and Part XV of the *Local Government (Miscellaneous Provisions) Act 1960*. However, the application of repealed sections causes confusion for stakeholders in the system. In order to clear up this confusion the effect of these repealed sections will cease and the relevant provisions from these sections have been reinstated, with necessary amendments, in proposed new sections 373A (Qualifications of local government building surveyors) and 373B (Appointment of local government building surveyors).

Subclause (3)

Paragraph (a) provides that the regulations given continuing effect by clause 4.2 of Schedule 9.2 to the *Local Government Act 1995* will continue to have effect. This will enable certificates of qualification (necessary to be held by a person occupying the office of building surveyor) issued by a committee constituted under repealed section 159 to continue to be recognised. This will be a necessary element of a transitional arrangement under which parallel sets of qualifications (existing state qualifications and the new national framework qualifications) will be maintained for a suitable period of time. Final transitional arrangements regarding what qualifications and experience will be necessary to hold the office of building surveyor will not be decided until full consultation with local authorities has taken place.

Paragraph (b) provides that the regulations made pursuant to this clause are treated as if they were made under the regulation making provision in section 9.59 of the *Local Government Act 1995* for the purposes of proposed new sections 373A and 373AAB, which provide respectively heads of power for making regulations regarding the qualifications of local government building surveyors and the delegation of authority to approve plans of buildings or unauthorised building work.

The reference to the *Local Government Act 1995* is necessary as the *Local Government (Miscellaneous Provisions) Act 1960* must be constructed as if its provisions were in the *Local Government Act 1995*.

CLAUSE 14. CONSEQUENTIAL AMENDMENTS TO THE BUILDERS' REGISTRATION ACT 1939

Subclause (1) makes consequential amendments to the *Builders' Registration Act 1939*.

Subclause (2) inserts new subsections (1a) and (1b) into section 4B of the *Builders' Registration Act*. These require a person to whom a building approval certificate is issued to pay the fee payable under this section, if the building work in relation to which the certificate is issued was done without the required building licence. This is intended to make sure that such persons cannot evade payment of this fee.

Subclause (3) makes consequential amendments to section 4B(2) of the *Builders' Registration Act* by adding:

- (a) a reference to a building approval certificate;
- (b) a reference to a (building approval) certificate; and
- (c) a reference to new subsection (1a).