



BUILDING PROFESSIONALS BOARD

Act and regulations

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Related	

Building Professionals Regulation 2007

The purpose of this circular is to provide councils, accredited certifiers, developers and the community with an overview of the Building Professionals Regulation 2007.

Introduction

A number of changes to the certification system have occurred with the recent commencement of the *Building Professionals Act 2005* (the Act). The Act introduces a new framework for accrediting, auditing and investigating accredited certifiers in NSW, and auditing local councils acting as certifying authorities. The provisions of the Act are summarised in *Building Professionals Act: a guide*, available at www.bpb.nsw.gov.au.

The Building Professionals Regulation 2007 (the Regulation) is a new regulation aimed at ensuring the effective operation of the Act. It contains provisions that identify categories of accreditation for accredited certifiers, set out accreditation fees and insurance requirements for certifiers, further define conflicts of interests for certifiers, and provide transitional arrangements, penalty notices and record keeping requirements for certifiers.

It is important for certifying authorities to familiarise themselves with the Regulation and the changes it prescribes. Below is a summary of the key provisions of the Regulation.

Categories of accreditation [clause 4 and Schedule 1]

The Regulation enables accredited certifiers to be accredited in 21 areas of specialisation and specifies the work that certifiers can undertake in each category.

The Building Professionals Board's accreditation scheme, made under section 4 of the Act, sets out the qualifications, skills, knowledge and experience requirements for each category of accreditation.

The categories of accreditation enable the consumer to easily identify the relevant expert they need to certify an aspect of work; the majority of the categories allow certifiers to issue compliance certificates in their areas of specialisation. Table 1 lists the categories of accreditation.

Table 1. Categories of accreditation

A1	Accredited certifier – building surveying grade 1
A2	Accredited certifier – building surveying grade 2
A3	Accredited certifier – building surveying grade 3
B1	Accredited certifier – subdivision certification
C1	Accredited certifier – private road and drainage design compliance
C2	Accredited certifier – private road and drainage construction compliance
C3	Accredited certifier – stormwater management facilities design compliance
C4	Accredited certifier – stormwater management facilities construction compliance
C5	Accredited certifier – subdivision works and building works (location of works as constructed) compliance
C6	Accredited certifier – subdivision road and drainage construction compliance
C7	Accredited certifier – structural engineering compliance
C8	Accredited certifier – electrical services compliance
C9	Accredited certifier – mechanical services compliance
C10	Accredited certifier – fire safety engineering compliance
C11	Accredited certifier – energy management compliance (Classes 3, 5 to 9)
C12	Accredited certifier – geotechnical engineering compliance
C13	Accredited certifier – acoustics compliance
C14	Accredited certifier – building hydraulics compliance
C15	Accredited certifier – stormwater compliance
C16	Accredited certifier – speciality hydraulic services compliance
D1	Accredited certifier – strata certification

Assessment process [clause 5]

The Regulation allows the accreditation scheme to specify the method of assessing whether a person has the qualifications, skills, knowledge and experience required for each of the categories of accreditation.

Under the accreditation scheme, the Building Professionals Board (the Board) will assess an applicant for accreditation against:

- core performance criteria
- speciality performance criteria for each category of accreditation in which they seek to be accredited
- the speciality qualification requirement for each category of accreditation in which they seek to be accredited
- the experience requirement for each category of accreditation in which they seek to be accredited.

For an outline of the requirements of the scheme, see Planning Circular BS07-002 *New scheme for accredited certifiers in New South Wales*, March 2007.

Renewal of accreditation [clause 6]

Under the Regulation, in order to renew their accreditation each year, accredited certifiers must provide to the Board an application in the form approved by the Board, the renewal application fee, and any other documents and information the Board requires to determine the application.

In addition, under the accreditation scheme certifiers must also provide evidence that demonstrates they have satisfied the continuing professional development (CPD) program requirements set out in Schedule 5 of the scheme for the previous calendar year.

An application must be lodged before the current certificate of accreditation expires, except as set out in the savings and transitional provisions in the Regulation (relating to accreditations that are due to be renewed from 1 March to 28 March 2007, inclusive).

Where an application is not lodged as required before the certifier's accreditation is due to expire, the person will have a gap in their accreditation, during which they will not be able to carry out the functions of a certifying authority, and they will have to apply to the Board for accreditation against the requirements of the accreditation scheme.

Prescribed condition – surrender of certificate of accreditation [clause 7]

The Regulation requires all accredited certifiers, as a condition of accreditation, to surrender any superseded accreditation certificate within 14 days where the Board varies the terms of accreditation.

This requirement ensures certifiers do not practise outside their prescribed area(s) of authorisation by using superseded accreditation certificates.

Contravening, or failing to comply with, this condition, like any condition of accreditation, is an offence under section 73 of the Act.

Record keeping by accredited certifiers [clause 8]

The Regulation specifies a list of documents and records that each certifier must keep. Certifiers need to familiarise themselves with these requirements. Under the Act, the Board can request a certifier, by notice in writing, to provide a copy of any of these documents or records within a specified time.

The record keeping requirements for accredited certifiers that were in the Environmental Planning and Assessment Regulation 2000 (EP&A Regulation) have been transferred, with amendments, to the new Regulation.

The major changes relating to record keeping from the EP&A Regulation are for accredited certifiers to keep:

- records of missed inspections required under the EP&A Regulation
- additional details for each project for which they have issued Part 4A or complying development certificates. That is, as well as requiring records previously required to be kept under the EP&A Regulation, such as the types of certificates issued, the classification of the building involved, the name of the relevant local government area and the estimated cost of the project, certifiers must now also record the name of the applicant, the address of the land or premises concerned, the owner of the land or premises and the name of the principal contractor
- details for each project for which they have issued strata certificates – the classification of the relevant building, the name of the relevant local government area, the address of the relevant land or premises, the name of the applicant, the owner of the relevant land or premises and the number of lots created
- documents that the accredited certifier was required to keep while accredited under the *Environmental Planning and Assessment Act 1979* (EP&A Act) (ie before 1 March 2007).

The records must be kept for at least 10 years from the date on which the relevant certificate was issued or, in the case of a record of a critical stage inspection or missed inspection, from the time the inspection was conducted or missed (previously 15 years under the EP&A Regulation).

In addition, the records must now be kept at either the certifier's business premises or in another secure place, at all times.

Certifiers are no longer required to provide a copy of their records to the accreditation body (the Board) on ceasing to be accredited.

Insurance [clauses 9 to 16]

In the main, the insurance provisions in the EP&A Regulation have been transferred to the Regulation. The insurance requirements that differ from the previous provisions of the EP&A Regulation are:

- The Regulation requires each accredited certifier to be covered by a professional indemnity insurance contract that contains cover of at least \$1 million (exclusive of a certifier's legal expenses of defending a claim) or \$2 million (inclusive of defence costs) for any one claim, up to a maximum of \$2 million (exclusive of defence costs) or \$4 million (inclusive of defence costs) for all claims in any one year.
- Accredited certifiers must hold insurance for these amounts irrespective of the legal entity by which they are employed. However, a company or partnership that employs accredited certifiers may hold insurance for those certifiers at those amounts up to a maximum of \$20 million for all claims in any one year.
- The automatic reinstatement provision in the EP&A Regulation has been removed.
- The requirement for company and partnership contracts to name individual accredited certifiers in the contract has been removed.

Further information on the insurance requirements for certifiers is available in the Board's Info Sheet 9, *Insurance required by accredited certifiers*, March 2007, available at www.bpb.nsw.gov.au.

Conflicts of interest [clauses 17 and 18]

A new circular on the conflicts of interest provisions in the Act and the Regulation will soon be available at www.bpb.nsw.gov.au. The following provides a summary of the provisions in the Regulation.

The Regulation sets out the difference between an accredited certifier providing design advice (a conflict of interest under the Act where the certifier issues a Part 4A or complying development certificate) and not providing design advice.

Clause 17 provides the circumstances, in addition to those set out in the section 67 of the Act, in which an accredited certifier is taken to be involved in the design of an aspect of development. These circumstances constitute a conflict of interest and prevent the certifier, under section 66 of the Act, from issuing a Part 4A or complying development certificate.

Clause 18, on the other hand, sets out the circumstances in which an accredited certifier is taken not to be involved in the design of an aspect of development (in relation to which they are not prevented from issuing a Part 4A or complying development certificate).

Under section 67 of the Act and clause 17 of the Regulation, an accredited certifier is involved in the design of any aspect of development by:

- being involved in preparing plans and specifications for that aspect of the development
- providing advice on how to amend the plans and specifications relating to the aspect of the development so that they will comply with the applicable legislative requirements, (other than for building work for classes 1 and 10 buildings so that they will comply with the deemed-to-satisfy provisions of the Building Code of Australia [BCA])
- proposing design options for the aspect of the development, including alternative solutions under the BCA
- issuing a strata certificate if they, or a related person, prepared the relevant strata plan, strata plan of subdivision or notice of conversion under the *Strata Schemes (Freehold Development) Act 1973* or *Strata Schemes (Leasehold Development) Act 1986*. This would include a colleague who works in the same company or partnership as the accredited certifier, or who works in a related company.

A certifier is taken not to be involved in the design of an aspect of development under clause 18 where they:

- provide advice on whether plans or specifications comply with legislative requirements or requirements of the BCA
- advise a client on how a strata plan does not comply with the approved construction certificate plans and specifications
- advise a client on consistency of building or subdivision work with the approved plans, specifications or the BCA
- identify what needs to be satisfied before a certificate can be issued, eg development consent conditions
- indicate an alternative solution is needed under the BCA
- identify the performance requirements of the BCA (without directing the applicant about potential alternative solutions), or
- participate in a fire engineering brief, but only for determining the scope of work for the fire engineering analysis and the basis for analysis as defined in the International Fire Engineering Guidelines.

Replacement of a certificate of accreditation [clause 19 and Schedule 2]

The Regulation enables the Board to issue a replacement certificate of accreditation to an accredited certifier on application if satisfied that the original was lost, stolen or damaged. The cost of applying for a replacement certificate is \$35.

Application for certificate of evidence [clause 20]

The Regulation entitles any person to apply for an evidentiary certificate under section 91 of the Act. This certificate may contain information relating to a certifier's accreditation at a certain time. The certificate may also set out information about a certifier that is contained in the public register required to be kept by the Board under section 11 of the Act. The certificate may be used as evidence in any legal proceedings. The cost of applying for a certificate is \$20.

Fees [clause 21 and Schedule 2]

The Regulation allows the Board to charge the following fees:

- \$1500 for an application for accreditation or renewal of accreditation for categories A1, A2, A3 and B1, or a combination of any of these categories, in one application
- \$750 for an application for accreditation or renewal of accreditation for categories C1-C16 or D1, or a combination of any of these categories, in one application
- \$35 for an application to replace a certificate of accreditation
- \$20 for an application for a certificate of evidence signed by the Director or authorised officer under section 91 of the Act
- \$40 for an application under section 109EA of the EP&A Act for approval to change the principal certifying authority or to notify the Board of such a change (flat fee for each change)
- \$100 for an application under section 71 of the Act for an exemption from the requirements of section 66(1)(d) of the Act in relation to a particular development or class of development (conflicts of interest where a certifier is associated with the relevant council)
- such fee as represents the reasonable cost to the Board of providing continuing professional development courses.

Despite the above fees for accreditation and renewal applications, the maximum fee to be charged of an applicant for accreditation in any number of categories of accreditation is \$1500.

The Regulation also allows the Board to waive or reduce a fee if the Board considers it appropriate.

Penalty notices [clause 22 and Schedule 3]

Section 92 of the Act enables an authorised officer to serve a penalty infringement notice (PIN) on a person if it appears that the person has committed a penalty notice offence. Penalty notices allow the person to pay the amount of the penalty prescribed in the time given if they do not wish to have the matter determined by a court. Once the amount is paid, the person is not liable to any further proceedings arising out of the same occurrence.

The Act allows the Regulation to prescribe penalty notice offences and the penalty payable for the offence, including different amounts of penalties for different offences or classes of offences. The offences and penalties the Regulation prescribes are summarised in Table 2.

Table 2. Penalty notice offences under the Regulation

Act section	Offence summary	PIN (\$)
s. 60(1)	Failure to keep prescribed records	550
s. 60(2)	Failure to provide prescribed records	550
s. 61(1)	Not notify Board of certain events	550
s. 61(2)	Not notify Board of status of insurance	550
s. 61(3)	Not notify Board of change of particulars	110
s. 63(1)	Work or hold out as insured if not insured	1100
s. 74(1)	PCA failure to notify owner of cancellation, suspension or change of conditions	550

Savings and transitional provisions [clause 23 and Schedule 4]

A separate circular provides details of the savings and transitional provisions in the Act (Schedule 2) and Regulation (Schedule 4). See Planning Circular BS07-004 *Transitional arrangements for existing accredited certifiers*, available at www.bpb.nsw.gov.au.

Changes to the EP&A Regulation (clauses 3, 130, 144A and 153A)

The EP&A Regulation has been amended through the Environmental Planning and Assessment Amendment (Compliance Certificates) Regulation 2007 to require certifying authorities (accredited certifiers and councils) to obtain or be provided with a compliance certificate from an accredited fire safety engineer (Category C10 certifier) before issuing a construction certificate or complying development certificate for building work that involves a fire safety alternative solution under the BCA.

The compliance certificate to be obtained is that referred to in section 109C(1)(a)(v) of the EP&A Act certifying that the alternative solution complies with the relevant performance requirements of the BCA.

The EP&A Regulation has also been amended to require certifying authorities to obtain, or be provided with a compliance certificate from an accredited fire safety engineer before issuing an occupation certificate for any building work that required a compliance certificate, as set out above, at the construction / complying development certificate stage.

This second compliance certificate at the occupation certificate stage is that referred to in section 109C(1)(a)(i) of the EP&A Act certifying that the building work relating to the alternative solution, that was the subject of the first compliance certificate, has been completed and complies with that alternative solution.

These amendments to the EP&A Regulation, however, will not commence until 1 March 2008.

Changes to the Administrative Decisions Tribunal (General) Regulation 2004

The Act allows a person to apply to the Administrative Decisions Tribunal (ADT) for a review of the Board's decision on an application for accreditation or the renewal of accreditation, on imposing or varying a condition of their accreditation, on suspending or cancelling their accreditation, on a disciplinary finding against the person and on any action taken by the Board as a result of the disciplinary finding (sections 18 and 33).

Under the *Administrative Decisions Tribunal Act 1997*, these decisions are called 'reviewable decisions'. Unless the Administrative Decisions Tribunal (General) Regulation 2004 (ADT Regulation) specifies otherwise, an applicant who seeks a review of a reviewable decision must first seek a review before the original decision maker (ie the Board).

Changes to the ADT Regulation under the Administrative Decisions Tribunal (General) Amendment (Further Exclusions) Regulation 2007, however, provide for a person to seek a review directly to the ADT (without first having to apply to the Board for an internal review) for a range of decisions that are made under the Act and Regulation by the Board. These decisions are shown in Table 3 below.

Table 3. Summary of Board decisions under the Act and Regulation for review directly to the ADT

Summary of decision	Act/Regulation reference
Refuse to renew an accreditation	s. 6(1)(b) of the Act
Renew an accreditation in a different category to that previously issued	s. 6(2)(b) of the Act
Convert an existing accreditation to the new categories of accreditation	s. 6(1)(a) of the Act; Schedule 4 cl. 2(1) of the Regulation
Alter or impose conditions on an accreditation or renewal	s. 6(1)(a) of the Act
Impose conditions on an accreditation on converting an accreditation	Schedule 4 cl. 2(1) of the Regulation
Vary or impose conditions on an accreditation at any time	s. 9(2) of the Act
Suspend or cancel an accreditation where the person: <ul style="list-style-type: none"> ▪ is mentally incapacitated ▪ has had their equivalent registration in another state suspended or cancelled ▪ is an undischarged bankrupt, or has not complied with an order of the Board after a disciplining finding 	s. 8(2)(c), (d), (e) and (f) of the Act
Disciplinary (complaint and audit) findings and action taken	s. 31(4) of the Act

For these decisions, the applicant is already given an opportunity to provide comments, and have those comments taken into account, before the Board makes a decision on the matter.

For a range of other decisions, the applicant must first seek an internal review by the Board before the ADT will review the Board's decision. These decisions are shown in Table 4 below.

Table 4. Summary of Board decisions that first require internal review by the Board

Summary of decision	Act/Regulation reference
Refuse a new application	s. 6(1)(b) of the Act
Issue a new accreditation in a different category	s. 6(2)(a) of the Act
Impose conditions on an accreditation	s. 6(1)(a) of the Act
Suspend or cancel an accreditation where: <ul style="list-style-type: none"> ▪ the person: dies; requests the Board in writing to cancel their accreditation; received it on a misrepresentation they made; or is not insured as required, or ▪ the Board made an error in issuing the accreditation 	s. 8(1) and s. 8(2)(a) and (b) of the Act
Emergency suspension/condition	s. 12 of the Act

For these decisions, the Act does not give an applicant or certifier an automatic right to provide comments to the Board before a decision is made.

Further information

The Building Professionals Regulation 2007, amended EP&A Regulation and amended ADT (General) Regulation 2004 are available from the Parliamentary Counsel's Office website at www.legislation.nsw.gov.au.

The Regulatory Impact Statement, prepared in accordance with the requirements of the *Subordinate Legislation Act 1989* in relation to the draft Building Professionals Regulation, is available at www.bpb.nsw.gov.au.

The *Building Professionals Act 2005: a guide*, which provides information particularly aimed at accredited certifiers and local councils about the provisions of the Act, is also available at www.bpb.nsw.gov.au.

Circulars issued on the requirements of the accreditation scheme and the savings and transitional provisions in the Act and Regulation are available at www.bpb.nsw.gov.au. A new circular on conflicts of interest for accredited certifiers will soon be available at www.bpb.nsw.gov.au.

Authorised by:

Kim Cull
Executive Director
Corporate Governance and Support Services

Important note

This circular does not constitute legal advice. Users are advised to seek professional advice and refer to the relevant legislation, as necessary, before taking action in relation to any matters covered by this circular.

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