NSW GOVERNMENT
Department of Planning

PLANNING circular

PLANNING SYSTEM

Act and regulation changes

Circular	PS 08–011
Issued	3 November 2008
Related	PS 08–006; PS 08–008; PS 08–010

Commencement of provisions on 3 November 2008—accredited bodies corporate

The purpose of this circular is to advise councils, accredited certifiers and the community of the provisions of the *Building Professionals Amendment Act 2008* and the Building Professionals Amendment (Accredited Bodies Corporate) Regulation 2008 (BP Amendment Regulation) that commenced on 3 November 2008 relating to accredited bodies corporate.

Introduction

The *Environmental Planning and Assessment Amendment Act 2008* and the *Building Professionals Amendment Act 2008* (the Amendment Acts) were assented to on 25 June 2008. Along with other matters, the Amendment Acts introduce significant changes to the planning and certification systems in NSW and were the subject of significant community consultation prior to their passage through Parliament. The provisions in the Amendment Acts will be commenced in stages—as the necessary regulations and guidelines are prepared, and following consultation with stakeholders on aspects of the reforms.

A number of provisions of the Amendment Acts commenced on 1 August 2008 and 1 September 2008 as outlined in Circulars PS 08-006 and PS 08-008, respectively.

The next group of provisions, together with supporting regulations, **commenced on 3 November 2008.**

Some of these changes enable the accreditation of bodies corporate as accredited certifiers.

These changes are summarised below.

In addition, the following also commenced on 3 November 2008:

- provisions relating to certain certification matters. These provisions are summarised in Circular PS 08-010
- provisions relate to the establishment of the Planning Assessment Commission, independent hearing and assessment panels and the appointment of planning administrators and assessment panels.

Councils and accredited certifiers should familiarise themselves with the requirements of the Amendment Acts and Amendment Regulation.

Amendments to the BP Act and BP Regulation

From the 3 November 2008, members of the public will have greater choice when looking to appoint a certifying authority. They can appoint the local council, an individual accredited certifier or an accredited body corporate.

Changes to the *Building Professionals Act 2005* (BP Act) and to the Building Professionals Regulation 2007 (BP Regulation) to introduce accredited bodies corporate are as follows.

Applications for accreditation

Section 5 of the BP Act has been amended to enable a body corporate to apply for a certificate of accreditation.

New section 5A enables the Building Professionals Board (the Board) to issue the following different classes of certificate of accreditation as an accredited certifier:

- a certificate of corporate accreditation which may be issued to a body corporate

- a certificate of individual accreditation which may only be issued to an individual.

The Board may only accredit a body corporate as an accredited certifier if the body corporate has at least one director who is an accredited certifier and employs, or has as directors, at least two other people who are accredited certifiers.

Schedule 2 of the BP Regulation sets the fee for an application for a certificate of corporate accreditation or for a renewal of a certificate of corporate accreditation at $1500.

The process for seeking accreditation is set out in Info Sheet 12, *Accreditation of bodies corporate* (Building Professionals Board October 2008), available from the Board's website at www.bpb.nsw.gov.au.

Grounds for refusal of accreditation

A new subsection 7(1A) has been inserted into the BP Act and new clause 5A into the BP Regulation to set out the circumstances in which the Board may refuse to issue or renew a certificate of corporate accreditation.

These circumstances are explained in Info Sheet 12, *Accreditation of bodies corporate*.

Suspension or cancellation of accreditation

Section 8 of the BP Act is amended to set out the circumstances in which the Board may suspend or cancel a certificate of corporate accreditation held by a body corporate (section 8(2A)). These circumstances are also set out in Info Sheet 12.

Register of accredited certifiers

In addition to the particulars currently required to be contained in the Board's register of accredited certifiers (section 11(2) of the BP Act), the Amending BP Regulation requires the following information to be kept on the Board's register in relation to each accredited body corporate (clause 20A):

- the name of each accredited certifier director of the body corporate and the date when his or her appointment as an accredited certifier director commenced and ceased
- the name of each employee of the body corporate who is an accredited certifier and the date when his or her employment commenced and ceased
- the category of accreditation held by each of the above persons.

Investigations and disciplinary action

The BP Act enables the Board to investigate complaints against an accredited body corporate and accredited certifiers acting on behalf of the accredited body corporate.

In addition, amendments have been made to section 46 of the BP Act to enable the Board to carry out an investigation (without the need for a complaint) into the work and activities of an accredited body corporate, an accredited certifier director, or an accredited certifier carrying out work on behalf of a body corporate or a council. Following an investigation, the Board can make disciplinary findings and impose disciplinary sanctions against the accredited body corporate, or accredited certifier director or employee.

Record keeping

Section 60 of the BP Act has been amended to enable the Board to serve a notice on an accreditation holder to require them to provide specified documents or records to the Board and for the Board to require such documents or records to be verified in a manner specified in the notice, including by statutory declaration.

Clause 8A has been inserted into the BP Regulation to prescribe the manner in which the records required to be maintained by clause 8 must be kept by the accredited body corporate. These are documents and records that are obtained or created by the accredited body corporate or by an accredited certifier director or accredited certifier employee carrying out certification work on behalf of the body corporate.

Where a body corporate ceases to hold accreditation, the person who last held the position of accredited certifier director of the body corporate before it ceased to be accredited, and who is an accredited certifier, must cause the relevant documents and records to be kept in accordance with clause 8. In the event of there being more than one accredited certifier director at the time the accreditation of the body corporate ceased, those directors may arrange between them the secure place in which the records are to be kept. These records are to be made available for inspection and copying on request to any person who obtained or created the record on behalf of the accredited body corporate.

Board to be notified of certain events

Section 61(4) of the BP Act requires accredited bodies corporate to provide the Board with written notice within seven days of the body corporate:

- ceasing to have at least one director who is an accredited certifier, and/or
- ceasing to have as directors or employ at least 3 accredited certifiers.

Clause 20B of the BP Regulation prescribes additional events that must be notified to the Board by an accredited body corporate, including:

- when a person is appointed as an accredited certifier director of the body corporate or when someone is employed by the accredited body corporate who is an accredited certifier
- the termination of employment of an employed accredited certifier or of appointment as an accredited certifier director
- when a person becomes concerned in the management of the body corporate or ceases

to be concerned in the management of the body corporate.

A maximum penalty of $5500 applies where an accredited body corporate fails to notify the Board within seven days of any of the above events.

Conflicts of interest

Section 66(5) of the BP Act has been inserted to prohibit an individual accredited certifier who is an employee or director of an accredited body corporate, from issuing a Part 4A or complying development certificate where the body corporate or any other accredited certifier who is a director or employee of that body corporate is, by operation of section 66(1), prohibited from issuing such a certificate.

Section 66(6) provides that if a director or employee of an accredited body corporate contravenes section 66(1), the body corporate is taken to have also contravened that section.

Responsibilities of accredited certifier directors

Section 72A of the BP Act sets out additional responsibilities of any and all accredited certifiers who are directors of an accredited body corporate. Each accredited certifier director must ensure that:

- the body corporate complies with the requirements of the BP Act and any other Act in carrying out of certification work and that appropriate management systems are in place to ensure compliance with those requirements
- certification work is allocated to and undertaken by a director or an employee of the body corporate who holds the appropriate accreditation
- the person who engages the body corporate to carry out certification work is kept informed as to the identity of the individual accredited certifier responsible for carrying out the work.

A contravention of any of these provisions by an accredited certifier director is an offence, with a maximum penalty of $33,000.

Each accredited certifier director also has responsibility to report to the Board any possible unsatisfactory professional conduct or professional misconduct of the body corporate or of another accredited certifier director or accredited certifier employee of the body corporate as soon as practicable after becoming aware of the conduct (section 72A(2) BP Act).

The BP Amendment Regulation also creates a prescribed condition of accreditation for all certificates of corporate accreditation which requires each accredited certifier director of an accredited body corporate to undertake a course relating to the responsibilities of accredited certifier directors. This course will be arranged by the Board and notified to the body corporate and will have to be completed within a specified time period nominated by the Board and notified to the accredited body corporate.

The responsibilities of accredited certifier directors, as well as other persons concerned in the management of an accredited body corporate, are further explained in Info Sheet 13, *Responsibilities of employees of accredited bodies corporate* (Building Professionals Board October 2008), available on the Board's website at www.bpb.nsw.gov.au.

Responsibilities of an accredited certifier acting on behalf of an accredited body corporate or council

Section 72B of the BP Act outlines the responsibilities of a person who holds a certificate of individual accreditation and who is employed by an accredited body corporate or by a council. An individual accredited certifier who is a director of or is employed by an accredited body corporate or a council has the same responsibilities that they would have if they were acting in their individual capacity as a certifying authority.

Offences relating to accredited bodies corporate

Section 72C of the BP Act creates the following offences in relation to the activities of an accredited body corporate:

- failing to ensure that certification work carried out in the name of or on behalf of the accredited body corporate is carried out by a director or employee of the body corporate who is the holder of an individual certificate of accreditation that authorises the individual to carry out that certification work
- undertaking certification work during any period during which it does not have at least one director who is an accredited certifier
- undertaking certification work during any period exceeding three months during which the body corporate has less than three employees or directors who are accredited certifiers.

If the accredited body corporate regains the required number of director and employee accredited certifiers, it must not undertake any certification work until it has notified the Board of this fact, in writing.

A maximum penalty of $110,000 applies to the above offences. If a corporation contravenes any provision of the BP Act or BP Regulation, each person who is a director of the corporation or who is taken to be concerned in the management of the corporation is taken to have contravened the same provision if the person knowingly authorised or permitted the contravention (section 93A(1) of the BP Act).

Insurance requirements for accredited bodies corporate

Clause 10 of the BP Regulation is amended to prescribe that an insurance contract that an accredited body corporate is required to be indemnified by is a company contract and sets out the liability against which the body corporate is to be indemnified.

Clause 12 of the BP Regulation requires the indemnity of a company contract, in the case of an accredited body corporate, to extend to:

- the company
- all persons who are or become accredited certifiers and directors or employees of the company during the term of the contract
- all persons who, at any time before the beginning of the term of the contract, had been accredited certifiers and directors or employees of the company.

Further information

The Amendment Acts, Amendment Regulation and proclamations are available online at www.legislation.nsw.gov.au.

If you require more information on the certification changes outlined in this circular, please contact the Building Professionals Board on (02) 9895 5950 or email bpb@bpb.nsw.gov.au.

Information sheets are also available on the Board's website www.bpb.nsw.gov.au on the following topics: the accreditation of bodies corporate, the responsibilities of bodies corporate once accredited, and the responsibilities of employees of accredited bodies corporate.

Authorised by:

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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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