



PLANNING SYSTEM

Act and regulation changes

Circular	PS 09-003
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Related	PS 08-006; 08-008; 08-010; 08-011; 09-002

Commencement of provisions— enforcement matters

The purpose of this circular is to advise councils, accredited certifiers and the community of the provisions of the *Environmental Planning and Assessment Amendment Act 2008*, *Environmental Planning and Assessment Amendment (Inspections and Penalty Notices) Regulation 2009*, *Building Professionals Amendment Act 2008* and the *Building Professionals Amendment (Inspections and Penalty Notices) Regulation 2009* relating to enforcement, which commence on 2 March 2009.

Introduction

The *Environmental Planning and Assessment Amendment Act 2008* and the *Building Professionals Amendment Act 2008* (the Amendment Acts) received assent 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 are being commenced in stages—as the necessary regulations and guidelines are prepared, and following consultation with stakeholders on aspects of the reforms.

Various provisions of the Amendment Acts commenced on 1 August 2008, 1 September 2008 and 3 November 2008 as outlined in circulars PS 08-006, PS 08-008, PS 08-010 and PS 08-011, respectively.

The next group of provisions, together with supporting regulations, were gazetted on 6 February 2009 and are due to commence on **2 March 2009**.

The changes summarised in this circular relate to enforcement matters, including providing for the issue of new penalty notices, introducing a stop work order and prescribing conditions of development consents and complying development certificates in relation to proposed development involving certain excavation that affects adjoining premises.

Councils, for example, will be able to issue stop work orders against unauthorised works along with forcing owners to protect neighbouring properties when they excavate for their home.

These changes are part of a series of reforms to the certification system that will place clearer requirements on certifying authorities and consumers.

In addition, the following are also to commence on 2 March 2009:

- new mandatory critical stage inspections
- new inspections prior to the issue of certain certificates
- authorisation for certain persons to carry out these inspections and to require certain records to be made of these new inspections.

These latter provisions are summarised in circular PS 09-002.

Councils and accredited certifiers should familiarise themselves with the requirements of the Amendment Acts and supporting regulations—the *Environmental Planning and Assessment Amendment (Inspections and Penalty Notices) Regulation 2009* and the *Building Professionals Amendment (Inspections and Penalty Notices) Regulation 2009*.

Amendments to the EP&A Act

Changes to the *Environmental Planning and Assessment Act 1979* (EP&A Act) that will commence on 2 March 2009 include the following.

New stop work order

Section 121B is amended to enable the issuing of orders for the cessation of building work or subdivision work where provisions of the EP&A Act are being contravened or the work affects the support of adjoining premises. Unauthorised works may include such developments as those:

- that are not in accordance with the original development consent or complying development certificate
- occurring under a complying development certificate when in fact a development application is required, or
- occurring with no approval whatsoever.

A stop work order can be issued under section 121B of the EP&A Act by:

- the Minister or the Director-General of the Department of Planning (but only in connection with a Part 3A project or development for which the Minister or the Director-General is or has been the consent authority)
- a council
- any other person who exercises functions as a consent authority, except in relation to complying development for which a complying development certificate has been issued.

The new Order No.19 may be given to the owner of the land or any person apparently engaged in carrying out building or subdivision work. This stop work order may be given without a notice of intention to issue an order.

Savings and transitional provisions prevent the issue of Order No.19 for building or subdivision work that was commenced before 2 March 2009.

Amendments to the EP&A Regulation

Changes to the Environmental Planning and Assessment Regulation 2000 (EP&A Regulation) that commence on 2 March 2009 include the following.

Prescribed condition relating to shoring and adequacy of adjoining property

The EP&A Regulation has been amended to prescribe conditions of development consents and complying development certificates dealing with the obligations of persons having the benefit of those consents or certificates in relation to proposed development involving certain excavation that affects adjoining properties.

Clause 98E (for development consents) and clause 136H (for complying development certificates) impose a prescribed condition that if a development involves an excavation that extends below the level of the base of the footings of a building on adjoining land, the person having the benefit of the development consent must, at the person's own expense:

- protect and support the adjoining premises from possible damage from the excavation
- where necessary, underpin the adjoining premises to prevent any such damage.

If the person with the benefit of the development consent owns the adjoining land or the owner of the adjoining land has given consent in writing to the condition not applying, this condition does not apply.

A prescribed condition is automatically imposed on consents (and complying development certificates). It is therefore up to councils and accredited certifiers as to how they include such conditions in consents (and complying development certificates) issued by them.

Penalty notice offences

Schedule 5 of the EP&A Regulation has been amended to insert a range of new offences under the EP&A Act and EP&A Amendment Regulation for which penalty infringement notices (PINs) may be issued.

The new PIN offences and new amounts for other offences are summarised, along with existing PINs, in Attachment 1 (EP&A Act offences) and Attachment 2 (EP&A Regulation offences).

Some of these PINs may only be issued by an authorised officer of the Minister or the Director-General of the Department of Planning. These offences are marked with an asterisk (*) in the attachments. All other offences under the EP&A Act and Regulation may be issued by an authorised person of the council or by a police officer.

Different penalty amounts for different offences or classes of offences are prescribed, allowing different penalty amounts to be issued depending upon whether the person is an individual or a corporation, and depending upon what class of building (under the Building Code of Australia) is affected. These different amounts are specified in Attachment 1.

Increased penalties are also able to be imposed where a person is required to do a certain thing within a specified time period, and has failed to do that thing for a period longer than the specified time.

Amendments to the BP Act

Penalty notice offences

Schedule 3 of the BP Regulation has also been amended to insert a range of new offences for which a PIN may be issued by the Building Professionals Board under section 92 of the *Building Professionals Act 2005* (BP Act).

The new PIN offences and new amounts for other offences are summarised in Attachment 3 (BP Act offences).

Only the Board or an authorised officer of the Board may issue PINs under section 92 of the BP Act.

Increased penalty amounts are now able to be imposed by PINs. Different penalties will be able to be imposed by way of a PIN depending upon whether it was an individual or a corporation who committed the offence. These amounts are listed in Attachment 3 to this Circular.

PINS under the BP Act will be able to be issued to any accreditation holder, including accredited certifiers employed by councils, accredited bodies corporate and individual accredited certifiers.

Further information

The Amendment Acts, amending regulations and commencement proclamation are available 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.

Note: This and other Department of Planning circulars are published on the web at www.planning.nsw.gov.au/planningsystem/practitioner.

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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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Attachment 1. Summary of penalty notice offences—EP&A Act

Notes

1. Shaded rows = existing penalty notices for which penalty infringement notice (PIN) amounts have been increased.
2. * Offences may only be issued by an authorised officer of the Minister or the Director-General of the Department of Planning.

Section	Circumstances of offence	Penalty
75D(1)	Carry out building or subdivision work in breach of this section	Individual - \$1500; Corporation - \$3000
76A(1)	Carry out building or subdivision work without development consent	<i>Class 1 and 10 buildings</i> Individual - \$750 Corporation - \$1500 <i>Class 2 to 9 buildings</i> Individual - \$1500 Corporation - \$3000
81A(2)	Carry out building work in breach of this section	<i>Class 1 and 10 buildings</i> Individual - \$750 Corporation - \$1500 <i>Class 2 to 9 buildings</i> Individual - \$1500 Corporation - \$3000
81A(4)	Carry out subdivision work in breach of this section	Individual - \$750 Corporation - \$1500
85A(10A)*	Forward or deliver a complying development certificate to the applicant where any long service levy has not been paid	Individual - \$750 Corporation - \$1500
85A(11)(a) *	Fail to notify the applicant of the determination of an application for a complying development certificate at the time of determination	Individual - \$250 Corporation - \$500
86(1)	Carry out building work in breach of this section	<i>Class 1 and 10 buildings</i> Individual - \$750 Corporation - \$1500 <i>Class 2 to 9 buildings</i> Individual - \$1500 Corporation - \$3000
86(2)	Carry out subdivision work in breach of this section	Individual - \$750 Corporation - \$1500
109D(2) or (3)*	Issue of an occupation certificate by a person who is not the PCA for the development	Individual - \$1500 Corporation - \$3000
109E(3)(d) *	Issue of an occupation or subdivision certificate without undertaking required site inspection as prescribed by the EP&A Regulation	Individual - \$750 Corporation - \$1500
109F(1)(b) *	Issue of a construction certificate where long service levy payable has not been paid	Individual - \$750 Corporation - \$1500
109H(3)(a) and (b)*	Issue of an interim occupation certificate to authorise a person to commence to occupy or use a partially completed new building where a development consent or complying development certificate are not in force or, in the case of a building erected pursuant to a development consent, a construction certificate has not been issued	Individual - \$1500 Corporation - \$3000

Section	Circumstances of offence	Penalty
109H(4)(a) *	Issue of an interim occupation certificate to authorise a person to commence a new use of part of a building resulting from a change of building use for an existing building where a development consent or complying development certificate is not in force with respect to the change of use	Individual - \$1500 Corporation - \$3000
109H(5)(a) and (b)*	Issue of a final occupation certificate to authorise a person to commence to occupy or use a new building where a development consent or complying development certificate are not in force or in the case of a building erected pursuant to a development consent, a construction certificate has not been issued	Individual - \$1500 Corporation - \$3000
109H(6)(a) *	Issue of a final occupation certificate to authorise a person to commence a new use of a building resulting from a change of building use for an existing building where a development consent or complying development certificate is not in force with respect to the change of use	Individual - \$1500 Corporation - \$3000
109J(1)(a) *	Issue of a subdivision certificate for a subdivision that is prohibited under the EP&A Act	Individual - \$1500 Corporation - \$3000
109J(1)(b) *	Issue of a subdivision certificate for subdivision that may not be carried out without development consent where no development consent is in force with respect to the subdivision	Individual - \$1500 Corporation - \$3000
109J(1)(e) *	Issue of a subdivision certificate for subdivision that relates to land within a water supply authority's area of operations where the applicant has not obtained a certificate of compliance from the water supply authority with respect to the subdivision of land	Individual - \$1500 Corporation - \$3000
109J(1)(f)*	Issue of a subdivision certificate for subdivision the subject of an order made by the Court under section 40 of the <i>Land and Environment Court Act 1979</i> concerning the provision of drainage easements, where not all such easements have been acquired by the council	Individual - \$1500 Corporation - \$3000
109J(1)(g) *	Issue of a subdivision certificate for subdivision the subject of a development consent before the period for notification of an objector has elapsed, or an appeal has been finally determined	Individual - \$1500 Corporation - \$3000
109J(2)(a) *	Issue of a subdivision certificate for subdivision that involves subdivision work where the work has not been completed	Individual - \$1500 Corporation - \$3000
109M(1)(a)	Occupation or use of the whole or any part of a new building without an occupation certificate (class 1 and 10 buildings)	\$330
109M(1)(b)	Occupation or use of the whole or any part of a new building without an occupation certificate (class 2-9 buildings).	Individual - \$1500 Corporation - \$3000
109N(1)	Effect a change of use for the whole or any part of an existing building without an occupation certificate	\$550
122E(3)	Fail to retain monitoring data in accordance with a condition of consent	Individual - \$1500 Corporation - \$3000
121B (orders 1, 2, 8, 9, 10, 11, 15, 18 and 19)	Fail to comply with order	Individual - \$1500 Corporation - \$3000

Attachment 2. Summary of penalty notice offences—EP&A Regulation

Notes

1. Shaded rows = existing penalty notices for which penalty infringement notice (PIN) amounts have been increased.
2. * Offences may only be issued by an authorised officer of the Minister or the Director-General of the Department of Planning.

Clause	Offence	Penalty
126(2)*	Fail to immediately endorse date of receipt of application for complying development certificate	Individual - \$250 Corporation - \$500
130(3)*	Fail to endorse evidence of issue of complying development certificate on documents lodged with application or submitted under clause 126	Individual - \$750 Corporation - \$1500
130(4)*	Fail to give notice to council of complying development certificate in required form within two days	Individual - \$750 Corporation - \$1500
134(1)*	Issue of a complying development certificate which does not contain information set out in clause 134(1)	Individual - \$750 Corporation - \$1500
134(2)*	Issue of a complying development certificate for the erection of a building that is not accompanied by a fire safety schedule for the building	Individual - \$1500 Corporation - \$3000
134(2A)*	Issue of a complying development certificate without including any relevant plans endorsed by the consent authority	Individual - \$750 Corporation - \$1500
138(1)*	Issue of a compliance certificate that does not contain information set out in clause 138(1)	Individual - \$750 Corporation - \$1500
138(2)*	Issue of a compliance certificate that is not accompanied by the documents referred to in the certificate	Individual - \$750 Corporation - \$1500
138(3)*	Fail to forward copy of a compliance certificate to consent authority when notified of the issue occupation certificate	Individual - \$750 Corporation - \$1500
142(1)*	Determine an application for a construction certificate otherwise than in accordance with clause 142(1)	Individual - \$750; Corporation - \$1500
142(2)*	Fail to forward written notice of determination of construction certificate to consent authority and council within two days	Individual - \$750 Corporation - \$1500
143A(2)*	Issue of a construction certificate for a residential flat development where the certifying authority has not received design verification from a qualified designer as set out in this section	Individual - \$1500 Corporation - \$3000
144(2)*	Fail to forward a relevant application for a construction certificate (or other documents listed in clause.144(2)) to the Fire Commissioner	Individual - \$1500 Corporation \$3000
144(5)*	Issue of a construction certificate for a building to which clause 144 applies where the certifying authority has not received or considered an initial fire safety report or where less than 23 days have elapsed from the application being forwarded to the Fire Commissioner and no report has been received	Individual - \$1500 Corporation - \$3000
144(6)*	Fail to give written notice to the Fire Commissioner of the non-adoption of the recommendations of the initial fire safety report and of the reasons for the non-adoption.	Individual - \$1500 Corporation \$3000
144(7)*	Fail to ensure the terms of a condition recommended by the initial fire safety report are included in the plans and specifications for the construction certificate or failing to attach the condition in the terms of the recommendation (whichever is appropriate)	Individual - \$1500 Corporation \$3000

Clause	Offence	Penalty
146*	Issue of a construction certificate for building or subdivision work under a development consent where one of the requirements in clause 146(a), (b) or (c) has not been complied with	Individual - \$750 Corporation - \$1500
147(1)*	Issue of a construction certificate that does not contain information set out in clause 147(1)	Individual - \$750 Corporation - \$1500
147(2)*	Issue of a construction certificate for a relevant building that is not accompanied by a fire safety schedule for the building	Individual - \$1500 Corporation - \$3000
151(1)*	Determine an application for an occupation certificate otherwise than in accordance with clause 151(1)	Individual - \$750 Corporation - \$1500
151(2)*	Fail to forward written notice of determination of OC to consent authority and council within two days	Individual - \$750 Corporation - \$1500
152(3)*	Fail to give notice to the Fire Commissioner of a refusal of an application for an occupation certificate that has been referred to the Fire Commissioner before the final fire safety report is provided	Individual - \$750 Corporation - \$1500
153(1)*	Issue of a final occupation certificate where a final fire safety certificate has not been issued for the building	Individual - \$1500 Corporation - \$3000
153(2)*	Issue of an interim occupation certificate where a final fire safety certificate or an interim fire safety certificate has not been issued for the relevant part of the building	Individual - \$1500 Corporation - \$3000
154A(2)*	Issue of an occupation certificate to authorise a person to commence occupation and use of a residential flat development where the certifying authority has not received a design verification from a qualified designer	Individual - \$750 Corporation - \$1500
154B(2)*	Issue of an occupation certificate for any building resulting from BASIX affected development or BASIX optional development unless the commitments whose fulfilment is required has been fulfilled	Individual - \$750 Corporation - \$1500
154C(1)*	Fail to apply to the Director-General within two days of issuing a final occupation certificate for a BASIX completion receipt.	Individual - \$250 Corporation - \$500
155(1)*	Issue of an occupation certificate that does not contain the information set out in clause 155(1)	Individual - \$750 Corporation - \$1500
155(2)*	Issue of an occupation certificate that is not accompanied by a fire safety certificate and fire safety schedule for the building	Individual - \$1500 Corporation - \$3000
157(5)*	Fail to immediately endorse the date of receipt of an application for a subdivision certificate on the application	Individual - \$250 Corporation - \$500
160(1)*	Determine an application for a subdivision certificate otherwise than in accordance with clause 160(1)	Individual - \$750 Corporation - \$1500
160(2)*	Fail to forward listed documents to the council within two days of determination of subdivision certificate	Individual - \$750 Corporation - \$1500
162(1)*	Fail to ensure that notice of appointment and approval of appointment is given to the consent authority within two days of the appointment	Individual - \$750 Corporation - \$1500
162B(1)*	Fail to make a record (as required by cl.162B(4)) of each critical stage inspection or other inspection required by PCA under section 109E(3)(d)	Individual - \$750 Corporation - \$1500
162B(2)*	Fail to provide the PCA forthwith, with a copy of the record of inspection required to be kept under clause 162B(1)	Individual - \$250 Corporation - \$500

Clause	Offence	Penalty
162C(4)*	Fail to inform the PCA of a missed inspection and of the circumstances that caused the inspection to be missed	Individual - \$750 Corporation - \$1500
162C(5) (a) or (b)*	Failure by the PCA to inform the person who appointed the PCA and the principal contractor (where relevant) of a missed inspection	Individual - \$750 Corporation - \$1500
163	Failure by the principal contractor for the building site or the owner-builder, to notify the PCA at least 48 hours before a required inspection needs to be carried out	Individual - \$750 Corporation - \$1500
172(1)(b)	Fail to display final fire safety certificate as required	Individual - \$1500 Corporation - \$3000
177(1)	Fail to give an annual fire safety statement that occurs during the first week after the time for giving the statement expires	\$500
	Fail to give an annual fire safety statement that occurs during the second week after the time for giving the statement expires	\$1000
	Fail to give an annual fire safety statement that occurs during the third week after the time for giving the statement expires	\$1500
	Failure to give an annual fire safety statement that occurs during the fourth or any subsequent week after the time for giving the statement expires	\$2000
177(3)(b)	Fail to cause a further copy of fire safety statement as required to be displayed in the building	\$100
180(1)	Fail to give a supplementary fire safety statement that occurs during the first week after the time for giving the statement expires	\$500
	Fail to give a supplementary fire safety statement that occurs during the second week after the time for giving the statement expires	\$1000
	Fail to give a supplementary fire safety statement that occurs during the third week after the time for giving the statement expires	\$1500
	Fail to give a supplementary fire safety statement that occurs during the fourth or any subsequent week after the time for giving the statement expires	\$2000
180(3)(b)	Fail to display supplementary fire safety statement as required	\$100
182(1)	Fail to maintain essential fire safety measure as required	\$1500
183(1)	Fail to display a fire safety notice in building as required by 183(1)	\$300
184(a), (b) or (c)	Interfere or impede with fire exit	\$300
185 (b)	Obstruct a doorway relating to a fire exit	\$300
186(a) or (b)	Obstruct a path of travel to a fire exit	\$300
227A(2)*	Failure by the PCA to ensure a sign is erected and maintained in accordance with this subclause	Individual - \$250 Corporation - \$500

Attachment 3. Summary of penalty notice offences – BP Act

Notes

1. Shaded rows = existing penalty notices for which penalty infringement notice (PIN) amounts have been increased.
2. These PINs can be only be issued by the Board or an authorised officer of the Board under section 92.

Section	Offence	Penalty
58(2)	Fail to comply with a direction or requirement of the BPB or an authorise officer under Part 5 of the BP Act	Individual - \$1500 Corporation - \$3000
60(1)	Fail to keep records as prescribed by the BP Regulation	Individual - \$750 Corporation - \$1500
60(2)	Fail to provide the Board with requested document	Individual - \$1500 Corporation - \$3000
61(1)	Fail to notify Board of event within seven days of becoming aware of event	Individual - \$1500 Corporation - \$3000
61(2)	Fail to notify the BPB of the forthcoming expiry of insurance at least seven days before the scheduled expiry	Individual - \$750 Corporation - \$1500
61(3)	Fail to notify the BPB of any change to the particulars recorded on the register within 14 days of the accredited certifier becoming aware of the need for change	Individual - \$250 Corporation - \$500
63(1)	Exercise certification functions or holding him/herself out as being covered by insurance where not covered by required insurance	Individual - \$1500 Corporation - \$3000
64(2)(a)	Carry out building work or subdivision without required insurance	Individual - \$1500 Corporation - \$3000
64(2)(b)	Building practitioner holding him/herself out as being covered by required insurance without required insurance	Individual - \$1500 Corporation - \$3000
66(1)	Issue of a Part 4A certificate or a complying development certificate in relation to an aspect of development in any of the circumstances listed in this subsection	Individual - \$1500 Corporation - \$3000
72	Act in a manner not authorised by a certificate of accreditation	Individual - \$1500 Corporation - \$3000
73	Contravene a term or failure to comply with a condition of the accredited certifier's certificate of accreditation	Individual - \$1500 Corporation - \$3000
74(1)	Fail to give notice as required by section 74(1)	Individual - \$750 Corporation - \$1500
85(1)(a)	Issue of a Part 4A certificate or complying development certificate that he or she is not authorised by or under the BP Act or EP&A Act to issue	Individual - \$1500 Corporation - \$3000
85(1)(b)	Make a statement that is false or misleading in a material particular in or in connection with a Part 4A certificate or complying development certificate	Individual - \$1500 Corporation - \$3000