



ENVIRONMENTAL PLANNING AND ASSESSMENT ACT 1979

## Building and Subdivision Certification

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Guidelines for Written Directions Notices

November 2019



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## Preamble

These Guidelines are published under section 6.5(6) of the *Environmental Planning and Assessment Act 1979* (EP&A Act) and apply to principal certifiers.

The Guidelines provide information on the mandatory requirements and processes to follow to issue a written directions notice under section 6.31 of the EP&A Act.

Legislative requirements are subject to change and prevail to the extent of any inconsistency with the Guidelines.

The Guidelines are consistent with the NSW Government's priority focus area to streamline the planning system to reduce complexity and provide clarity and ease around compliance.

In these Guidelines, any reference to a section is a reference to a section of the EP&A Act and any reference to a clause is a reference to a clause of the *Environmental Planning and Assessment Regulation 2000* (EP&A Regulation) unless otherwise stated.

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# Compliance responsibilities of principal certifiers

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## 1. Directions by principal certifiers

- 1.1. A directions notice is a compliance tool available to principal certifiers under section 6.31 of the EP&A Act. The notice must be issued in writing where it is suspected that there is, or is likely to be non-compliance with aspects of development and gives the person responsible for that aspect of development an opportunity to remedy the non-compliance (including a potential non-compliance) before further compliance action might be taken by a consent authority.
- 1.2. For the purposes of these Guidelines, these directions notices will be referred to as a WDN.
- 1.3. Attachment A provides a checklist for issuing a WDN.
- 1.4. A WDN must be issued in the form approved by the Planning Secretary.<sup>1</sup> Attachment B provides the WDN form, which is available on the website of the Department of Planning, Industry and Environment (**Department**).

## 2. Mandatory requirements for private principal certifiers

- 2.1. It is now mandatory for private principal certifiers to issue a WDN to the responsible person on becoming aware of “any non-compliance”.<sup>2</sup>
- 2.2. A private principal certifier is a certifier that has been appointed as the principal certifier but is not a consent authority or council.
- 2.3. Generally, the responsible person will be the principal contractor or owner-builder.
- 2.4. The WDN must be issued within 2 business days of becoming aware of the non-compliance.<sup>3</sup>
- 2.5. Council certifiers appointed as principal certifiers may also issue WDNs but it is not mandatory.<sup>4</sup>
- 2.6. A WDN must:
  - a. Identify the matter that has resulted in or would result in the non-compliance,<sup>5</sup>
  - b. Specify the **compliance period** allowed to remedy the non-compliance, and<sup>6</sup>
  - c. Specify the action to be taken to remedy the non-compliance.<sup>7</sup>

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<sup>1</sup> Clause 161A(3)

<sup>2</sup> Section 6.31(1)

<sup>3</sup> Clause 161A(3)

<sup>4</sup> Section 6.31(1)

<sup>5</sup> Section 6.31(1)(a)

<sup>6</sup> Section 6.31(1)(b) and clause 161A(4)

<sup>7</sup> Section 6.31(1)(b)

- 2.7. Within a reasonable period after the expiry of the period permitted to remedy the non-compliance, the principal certifier must:
- a. Return to site to conduct an inspection to assess whether the responsible person has complied with the WDN,<sup>8</sup> and
  - b. Make a record of the inspection and provide a copy to the responsible person. The Department has designed a WDN template to assist with this process.<sup>9</sup>
- 2.8. If the responsible person has failed to comply with the WDN, the principal certifier must:
- a. Notify the land owner (including an owner's corporation).<sup>10</sup>
  - b. Notify the consent authority within two days of conducting the inspection.<sup>11</sup>
  - c. Send the consent authority and land owner a copy of the completed WDN advising them that it has not been complied with.<sup>12</sup>
- 2.9. If the principal certifier became aware of the non-compliance via a complaint, it is also recommended that the certifier advise the complainant of the outcome.
- 2.10. Once the principal certifier refers the completed WDN to the consent authority, the consent authority becomes responsible for any further enforcement action.

### 3. Definition of a section 6.31 non-compliance

- 3.1. A non-compliance for the purposes of a WDN is the carrying out of any works that does not accord with the relevant approval including any approved plans and the conditions of development consent.<sup>13</sup>
- 3.2. Exceptions to this include when a non-compliance has been identified during a critical stage inspection.<sup>14</sup>
- 3.3. Principal certifiers usually become aware of Section 6.31 non-compliances by a complaint made by a neighbour, a referral from council, or while on site.

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<sup>8</sup> Clause 161A (5)

<sup>9</sup> Clause 161A (6)

<sup>10</sup> Clause 161A(9)

<sup>11</sup> Section 6.31(2) and clause 161A(8)

<sup>12</sup> Clauses 161A(8)-(9)

<sup>13</sup> Section 6.31

<sup>14</sup> Clause 161A(2)

## 4. When should a non-compliance be handled by a principal certifier?

- 4.1. There are many non-compliances for which a WDN would be issued. The principal certifier is to determine whether a matter is a non-compliance using their professional judgement, however some examples of typical non-compliances for which a principal certifier should issue a WDN include:<sup>15</sup>
- a. A builder has poured the footings and they are not located correctly. Without remedial action the building walls will be too close to the boundary.
  - b. A pool is under construction but does not have a safety barrier. The pool shell is holding 0.5m of water from rainfall.
  - c. A section of sediment fence is damaged causing it to be potentially ineffective.
  - d. The tree-protection zone required by the development consent has not been provided.
  - e. An internal floor layout is inconsistent with the development consent. For example, the lounge, kitchen and dining area layout has been reversed.
  - f. A heritage protected building façade has not been painted to the approved colour scheme.
  - g. A dwelling has been approved with an upper storey ceiling height of 2.4m but wall frames have been installed with a ceiling height of 2.7m.
  - h. Works may have commenced where there is no construction certificate.<sup>16</sup>
  - i. Works requiring a critical stage inspection before commencement are undertaken prior to that inspection.<sup>17</sup>
  - j. A whole occupation certificate is not obtained within five years after a partial occupation certificate was first issued.<sup>18</sup>

## 5. When would a non-compliance be handled by a council (consent authority)?

- 5.1. Councils may become involved in a non-compliance when it relates to:
- a. Work that may not form part of a development consent and therefore is not the responsibility of the private principal certifier.
  - b. Breaches of housekeeping or environmental conditions of consent generally enforced by council rangers including hours of work, footpath and roadway obstructions, odours and fumes, noise, dust, sediment control and pollution discharges, and public safety issues.
  - c. Incidents involving issue of penalty infringement notices and/or prosecution proceedings.

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<sup>15</sup> The list of examples has been developed in consultation with accredited certifiers and consent authorities.

<sup>16</sup> Section 6.8

<sup>17</sup> Clauses 162A(4) to (7A)

<sup>18</sup> Clause 156A

- d. Public interest incidents such as matters governed by other legislation including (but not limited to) the *Biodiversity Conservation Act 2016*, the *Local Government Act 1993* and the *Roads Act 1993*.<sup>19</sup>

5.2. The above examples are intended to align with the types of development control orders that an enforcement authority would ordinarily be required to give under the EP&A Act if a person failed to comply with the WDN.<sup>20</sup> An enforcement authority would typically be council but could also be the Minister, Secretary, or another consent authority other than a council.<sup>21</sup>

5.3. The issuing of a WDN is not mandatory for councils.<sup>22</sup> If a council chooses to issue a WDN, it still needs to issue a “notice of intention to give an order” before giving an order.<sup>23</sup>

## 6. Estimating the compliance period

6.1. The timeframe specified in a WDN is the date by which the recipient must demonstrate to the principal certifier that they have remedied the non-compliance.

6.2. The timeframe specified should reflect the seriousness of the non-compliance and should be reasonable and evidence-based.

## 7. Contents of a written directions notice

7.1. The WDN form approved by the Secretary is comprised of two parts:<sup>24</sup>

- a. Part A - The direction.
- b. Part B - The inspection record.

7.2. The WDN should include the following information:

- a. Date the notice is issued.
- b. Development application/complying development consent number.
- c. Construction certificate number.
- d. Address of the site at which the non-compliance occurred.
- e. Name of the land owner on whose land the non-compliance occurred.
- f. Name and address of the responsible person.
- g. Name of the consent authority.
- h. A detailed description of the non-compliance (photographic evidence may be attached).
- i. Steps to be taken by the recipient to remedy the non-compliance.

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<sup>19</sup> For example, matters of public interest considered under section 4.15(1)(e)

<sup>20</sup> Schedule 5 to the EP&A Act

<sup>21</sup> Section 9.35

<sup>22</sup> Section 6.31(1)

<sup>23</sup> Clause 8 of Schedule 5 to the EP&A Act

<sup>24</sup> Clause 161A(3)

- j. The compliance timeframe allowed for the recipient to demonstrate they have taken steps to remedy the non-compliance.
- k. Date on which the principal certifier proposes to return to site to conduct an inspection.
- l. Name of the principal certifier.
- m. Accreditation number of the principal certifier.
- n. Postal address of the principal certifier.
- o. Contact phone number and email address of the principal certifier.
- p. Signature of the principal certifier.

7.3. An inspection record should include:

- a. The inspection date and address of the site where the inspection was carried out.
- b. Whether steps have been taken to remedy the non-compliance.
- c. If the responsible person has failed to comply with the WDN, a detailed description of the failure.
- d. If the inspection was carried out by a council, the name of the council, and the identity and signature of the individual who carried out the inspection.<sup>25</sup>
- e. If the inspection was carried out by an accredited certifier (including where the accredited certifier is a body corporate or carrying out the inspection on behalf of a body corporate) the identity, signature and accreditation number of the individual who carried out the inspection.<sup>26</sup>

7.4. If the responsible person has failed to comply with the WDN, the principal certifier must provide a copy of the completed WDN to the council (consent authority) within two days after the inspection was carried out, along with advice confirming that the WDN has not been complied with.<sup>27</sup> A copy of the same must also be provided to the owner of the land (including an owners' corporation).<sup>28</sup>

7.5. Certifiers should provide copies of information (including photographic evidence) which support the principal certifier's decision making process (including inspection record) to the council and land owner, along with the completed WDN.

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<sup>25</sup> Clause 161A(7)(c)

<sup>26</sup> 161A(7)(d)

<sup>27</sup> Clause 161A(8)

<sup>28</sup> Clause 161A(9)

# Compliance tool – Rapid risk evaluation (optional)

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## 8. Overview of a rapid risk evaluation

- 8.1. To assist principal certifiers in prescribing compliance periods to remedy non-compliances, an optional rapid risk evaluation tool has been developed.
- 8.2. The tool takes a best practice risk-based approach to identifying the most appropriate timeframe allowable for non-compliances to be remedied.
- 8.3. While not mandatory, it is recommended that principal certifiers use the tool to support the WDN process. The tool should only be applied by a principal certifier after it is clear there is a non-compliance or a potential non-compliance that needs rectification.
- 8.4. Overall, the tool will enable the compliance response of principal certifiers to be more
  - a. consistent,
  - b. transparent,
  - c. evidence based,
  - d. efficient, and
  - e. proportionatewhile improving information provided to consent authorities/councils for their compliance and enforcement action.
- 8.5. Attachment C provides a template for using the rapid risk evaluation tool.

## 9. Benefits for principal certifiers

- 9.1. A rapid risk evaluation will assist principal certifiers in documenting their rationale for issuing a WDN for non-compliance. This information may be useful in a situation where a person makes representations to a consent authority that a development control order ought not to be given, or a complainant alleges that the principal certifier did not act on their complaint.
- 9.2. Conducting a rapid risk evaluation demonstrates a principal certifier has:
  - a. Given appropriate consideration to the non-compliance,
  - b. Ensured their compliance response is proportionate to the consequences of the non-compliance,
  - c. Prioritised the response required of the recipient to the WDN based on the compliance period specified by the tool, and
  - d. Taken a best practice risk-based approach to dealing with non-compliance.

## 10. Conducting a rapid risk evaluation

- 10.1. When conducting a rapid risk evaluation, the principal certifier should consider the consequences of non-compliance in terms of risk to health and safety, environmental impacts and social impacts.

10.2. The steps for conducting a rapid risk evaluation after a non-compliance has been identified are:

Step 1 – Identify the consequences.

Step 2 – Evaluate the severity level of the consequence.

Step 3 – Evaluate the likelihood of the consequence occurring.

Step 4 – Cross reference the severity and likelihood evaluations to the risk matrix to find the risk rating. Each risk rating has a corresponding compliance period. The compliance period is the time allowed for the recipient of the WDN to demonstrate they have taken steps to remedy the non-compliance.

10.3. This process is intended to be quick and principal certifiers should take a common-sense approach.

### Evaluating the 'severity level' of a consequence

10.4. To determine whether a consequence is major, moderate or minor, consideration should be given to its impact and the extent of the negative consequences that have resulted or could result.

10.5. Principal certifiers should ask the following questions:

- a. In the opinion of the principal certifier, what is the most realistic health and safety, environmental, or social impact consequence caused by the non-compliance?
- b. In the opinion of the principal certifier, how severe is the consequence from a health and safety, environmental, or social impact perspective?

10.6. Table 3 provides examples of consequences of non-compliance by severity level. The examples are provided to help guide principal certifiers on what would be considered major, moderate and minor consequences.

**Table 1 – Examples of the severity levels of consequences**

Severity Level	Examples of consequences
Major	<p><b>Health and safety:</b> Excavation close to boundary potentially causing a collapse of the adjoining building and a risk to life.</p> <p><b>Environmental:</b> Erosion control fence damage causing sediments to run off into a nearby creek.</p> <p><b>Social impact:</b> Unauthorised works causing major damage to heritage items.</p>

Severity Level	Examples of consequences
<b>Moderate</b>	<p><b>Health and safety:</b> Portions of the sediment fence are damaged causing it to track sediment on the roadway and adjoining properties.</p> <p>The builder has poured the footings but they are not located correctly. Without remedial action the building walls will be too close to the boundary which may affect fire safety requirements or accessways.</p> <p><b>Environmental:</b> Tree protection zone required by development consent has not been provided causing moderate damage to tree (for example, tearing of tree limb).</p> <p><b>Social impacts:</b> Dwelling approved with an upper storey ceiling height of 2.4m while wall frames have been installed with a ceiling height of 2.7 metres causing additional overshadowing or visual impacts.</p>
<b>Minor</b>	<p><b>Health and safety:</b> A portion of the sediment fence is damaged causing it to be ineffective.</p> <p><b>Environmental:</b> Tree protection required by development consent not provided causing minor damage to tree (for example, damage to tree bark).</p> <p><b>Social impact:</b> Internal floor layout inconsistent with development consent - reverse of lounge kitchen dining area potentially causing amenity issues for neighbours if not remedied.</p> <p>Heritage protected building façade not painted to approved colour scheme causing heritage value to be diminished.</p>

### Evaluating the 'likelihood level' of a consequence occurring

10.7. To determine whether the likelihood level is highly likely, likely or unlikely, consideration should be given to the probability of a consequence occurring.

10.8. Table 2 defines the likelihood levels to be applied during the rapid risk evaluation.

**Table 2 – Evaluating the likelihood level of a consequence occurring**

Likelihood Level	Definition
<b>Highly likely</b>	Consequences that have or are almost certain to occur.
<b>Likely</b>	Consequences where the probability of occurring is between highly likely or unlikely.
<b>Unlikely</b>	Consequences that are extremely rare and there is almost no probability of occurring.

### Applying the risk rating matrix

10.9. The risk rating enables a principal certifier to identify the seriousness of each non-compliance and the corresponding compliance period recommended for the recipient of the WDN to comply.

10.10. To determine whether a risk rating is high, medium or low, the results of the severity and likelihood evaluations should be cross referenced on the risk matrix.

10.11. Table 3 provides the risk rating matrix to be applied during the rapid risk evaluation.

10.12. The corresponding compliance periods ascribed to each risk rating are:

- a. High – Up to 7 days,
- b. Medium – Up to 14 days, and
- c. Low – Up to 28 days

10.13. Although not mandatory nor required by legislation, the Department considers the timeframes provide principal certifiers with a suitable guide for determining the appropriate compliance period to prescribe to the person responsible for the non-compliance.

**Table 3 – The risk rating matrix**

		Likelihood levels		
		Unlikely	Likely	Highly likely
Severity levels	Minor	<b>Low</b> (up to 28 days)	<b>Low</b> (up to 28 days)	<b>Medium</b> (up to 14 days)
	Moderate	<b>Low</b> (up to 28 days)	<b>Medium</b> (up to 14 days)	<b>High</b> (up to 7 days)
	Major	<b>Medium</b> (up to 14 days)	<b>High</b> (up to 7 days)	<b>High</b> (up to 7 days)

## Find out more

For more information, please use the following links:

- [Planning Circular – Commencement of Part 6 \(building and subdivision certification provisions\)](#)
- [Frequently Asked Questions: Written Directions Notice](#)
- [Environmental Planning and Assessment Act 1979](#)
- [Environmental Planning and Assessment Regulation 2000](#)

To contact us:

- Via email [legislativeupdates@planning.nsw.gov.au](mailto:legislativeupdates@planning.nsw.gov.au)
- By telephone on 1300 305 695.

# Attachments

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## Attachment A – Written Directions Notice Checklist

### Steps for issuing a Written Directions Notice (WDN)

Step	Action to be taken	Check
1	Identify the matter that has or would result in the non-compliance.	
2	Identify the action needed to remedy the non-compliance.	
3	<p>Identify the compliance period to remedy the non-compliance.</p> <p><b>Optional step: Conduct a rapid risk evaluation</b></p> <ul style="list-style-type: none"> <li>a. Identify the consequences of the non-compliance in terms of health and safety, the environment and social impacts.</li> <li>b. Assess the likelihood and severity level of each consequence and apply them to the risk matrix to identify the risk rating.</li> <li>c. Identify the compliance period that corresponds to the risk rating.</li> </ul>	
4	Fill out Part A of the WDN.	
5	Within 2 days of becoming aware of the non-compliance, direct the person responsible for the aspect of development to remedy the non-compliance by issuing the WDN.	
6	Return to site on the date specified on the WDN and conduct an inspection to determine if the recipient has remedied the non-compliance.	
7	Fill out Part B of the WDN.	
8	If the recipient has failed to comply, notify the recipient, consent authority and beneficiary of the development consent by sending them a copy of the completed WDN.	
9	If the private principal certifier was made aware of the non-compliance by a complainant, the principal certifier should advise the complainant of the outcome.	

## Attachment B – Template - Written Directions Notice

### Written Directions Notice

#### Part A – Written direction

(Section 6.31 of the *Environmental Planning and Assessment Act 1979*)

		Date WDN Issued:	
DA/CDC No:		Construction Certificate No:	
Name: (of person responsible for the aspect of development)			
Address: (of person responsible for the aspect of development)			
Address: (of development site)			
Name (of the land owner on whose land the non-compliance occurred)			
Council or consent authority name:			
Description of the non-compliance:			
Steps to be taken to remedy the non-compliance:			
Date by which the person responsible for the aspect of development must demonstrate they have remedied the non-compliance:			
Date principal certifier proposes to conduct an inspection:			
<b>Note: If the non-compliance is not remedied by the inspection date, a notice will be provided to the council and property owner within 2 days after inspection</b>			
Name of principal certifier:		Registration number:	
If the certifier is acting on behalf of a council or body corporate, name of council or body corporate:			
Postal address of principal certifier:		Mobile phone number:	
Email address:			
Signature:			

**KEEP PARTS A AND B TOGETHER**

# Written Directions Notice Part B – Inspection Record

(Section 6.31 of the Environmental Planning and Assessment Act 1979)

<b>Date of Inspection:</b>			
<b>Has the WDN been complied with?</b>	Yes	No	
<b>If no, please describe the failure:</b>			
<b>Name of certifier conducting inspection:</b>			
<b>Registration number:</b>			
<b>Postal address of certifier:</b>			
<b>Email address:</b>			
<b>Mobile phone number:</b>			
<b>Signature:</b>			
<i>Note: On completion of the inspection, provide the inspection record to the Principal Certifier</i>			
<i>Note: If the responsible person did not comply with the WDN, the Principal Certifier will forward the WDN to the consent authority, land owner and owner's corporation, as required</i>			
<b>KEEP PARTS A AND B TOGETHER</b>			

