

# Guidance material for certifiers

## Staged building work and applications for construction certificates: Which edition of the BCA applies?

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### Scope of this guidance material

The purpose of this note is to provide guidance on how to approach 'staged building work' and the important link between the making of a construction certificate application and the applicable edition of the Building Code of Australia (**BCA**), and also to address modified development in this context.

This document discusses the general position in relation to the issues it deals with and is not legal advice. This document also does not consider circumstances which may be the subject of exceptions set out in the *Environmental Planning and Assessment Regulation 2000* (**EP&A Regulation**) and is therefore not applicable to those circumstances. Certifiers should rely on their own independent legal advice when carrying out their functions under the EP&A Regulation and the *Environmental Planning and Assessment Act 1979* (**EP&A Act**).

### Which edition of the BCA applies?

Where an applicant seeks separate construction certificates for stages of building work, each stage must be the subject of a separate application. **The date of each application determines the edition of the BCA that applies to the assessment of that application.** So, the edition of the BCA applied to the first construction certificate application does not 'lock in' the edition applied to any subsequent applications.

Any subsequent **applications** must be determined against the edition of the BCA that is in force at the time of the **making of the application** for the relevant stage of the building work.

## Rationale

This position is based on clause 145(1)(b) of the EP&A Regulation which provides that a certifier must not issue a **construction certificate** for building work unless the proposed building (not being a temporary building) will comply with the relevant requirements of the BCA as in force at the time the **application for the construction certificate was made**.

The clear policy intention of these provisions is to ensure that the current edition of the BCA is applied to those proposed building works that are the subject of each construction certificate. Once a development consent has been substantially commenced it does not lapse and there could be a substantial period of time between the application for the first construction certificate for a project and applications for any subsequent construction certificates for later stages of the project.

It is also noted that the ongoing updating of the BCA is informed through advances in knowledge, innovation and technology. Therefore, there is an obligation for certifiers to ensure that the proposed building works the subject of any construction certificate will comply with the most up to date minimum building standards from time to time (as detailed in the edition of the BCA that is in force at the time of the making of the associated construction certificate application).

## Modified development

A person who has made an application for a construction certificate (**CC Application**) and a person having the benefit of a construction certificate (**Existing CC**) may apply under s 4.55 of the EP&A Act to modify the development consent that relates to the CC Application or the Existing CC.

If the modification of the development consent is approved by the consent authority the CC Application or Existing CC (as relevant) will need to be updated to be consistent with the development as modified (see clause 145(1)(a) of the EP&A Regulation).

## Modifying a CC Application

Where the modification of a development consent is approved (under s4.55 of the EP&A Act) before an existing CC Application relating to that development is determined, the certifier must ensure:

- the construction certificate which is issued (for the development as modified) is accompanied by the documentation accompanying the CC Application showing the modifications to the development as verified by the certifier; and
- the proposed building will be compliant with the edition of the BCA which was in force at the time the **modification application** under s4.55 of the EP&A Act was made (not at the time the original CC Application was made).

## Modifying an Existing CC

When a modification application is made under s4.55 of the EP&A Act and an Existing CC has been issued in relation to part of that development as modified, a **new construction certificate** may need to be issued.

This will depend on whether any building work the subject of the Existing CC has been physically commenced at the time the application to modify the development is determined.

This is because s6.8(2) of the EP&A Act provides that a construction certificate has no effect if it is issued after the building work to which it relates has physically commenced.

### **When some works authorised by the Existing CC have physically commenced**

Where there have been some works the subject of the Existing CC which have physically commenced, a new construction certificate would need to be applied for, for the remainder of those works (being those that are the subject of the modified development which are yet to be physically commenced).

The certifier dealing with the modified development must ensure the developer applies for a new construction certificate for the remainder works and the proposed building the subject of the determination will be compliant with the edition of the BCA **which was in force at the time the modification application was made** (not at the time the original application for the Existing CC was made).

### **When works authorised by the Existing CC have not physically commenced**

When works authorised by the Existing CC have not physically commenced at the time the modification application is determined, the certifier is not required to issue a new construction certificate. Instead, if the consent authority determines to approve the modification of the development, the certifier must reflect the fact that the modification of the development has been approved by noting on the documents accompanying the Existing CC that the modifications to the development have been verified by the certifier.

When considering an application for a further CC following the modification of a development consent to which the Existing CC relates, the certifier must note that the edition of the BCA which applies is the one which was in force at the time the modification application was made (not at the time the original application for the Existing CC was made).

## Rationale

This position is based on clause 148(1) of the EP&A Regulation which provides that a person who has made a CC Application and a person who has the benefit of an Existing CC may apply to modify the development the subject of the CC Application or Existing CC. This is a modification under s4.55 of the EP&A Act.

In addition, clause 148(2) of the EP&A Regulation provides that Part 8 Division 2 of the EP&A Regulation applies to an application to modify development in the same way as it applies to the original CC Application.

So, where a person makes an application to modify development under s4.55 of the EP&A Act and there is a CC Application or an Existing CC for part of that development, the certifier cannot issue a construction certificate for building works the subject of the modified development unless the proposed building will comply with the relevant requirements of the BCA (as in force at the time the application to modify the development was made).

This interpretation is consistent with the policy intention explained above in relation to clause 145(1)(b) of the EP&A Regulation and is designed to ensure the proposed building the subject of any construction certificate which is issued when an application to modify development is approved under s4.55 of the EP&A Act will be compliant with the most up to date minimum building standards from time to time (as detailed in the edition of the BCA that is in force at the time of the making of the application to modify the development).

This is because a significant amount of time may pass between the making of the original CC Application (or the granting of the Existing CC) and the making of the application to modify the development under s4.55 of the EP&A Act. If the original CC Application or Existing CC 'locked in' the edition of the BCA with which subsequently modified versions of the development would need to comply this would not be an application of Part 8 Division 2 of the EP&A Regulation which was "the same" as how that Part and Division apply to an original CC Application.

## What is the application date?

Where applicable, the date the CC Application was made is the date the application is lodged on the NSW Planning Portal. Importantly, clause 296 of the EP&A Regulation provides a transitional provision in relation to the requirement to lodge applications on this Portal.

For applications that were not submitted on the Portal, the date the application is made is the date the application was:

- made in person; or
- if transmitted electronically (such as by email), the date on which the application was received by the certifying authority; or
- if sent by mail, the date the application was received by the certifying authority.

For the purpose of applications to modify development under s4.55 of the EP&A Act (to which clause 148 of the EP&A Regulation applies) the relevant date (for the purpose of determining the edition of the BCA which applies to any construction certificate issued in respect of the development as modified) is the date on which the modification application is lodged on the NSW Planning Portal under s4.55 of the EP&A Act.