



PLANNING SYSTEM

Act and regulation changes

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Related	

Commencement of certain provisions of the EP&A Amendment Act 2008 and the BP Amendment Act 2008

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* and the *Building Professionals Amendment Act 2008* that will commence on 1 August 2008.

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 system in NSW. These Amendment Acts were the subject of significant community consultation prior to their passage through Parliament.

Most of the provisions in the Amendment Acts will be commenced in stages over the next 12 months as necessary regulations, guidelines and changes to the accreditation scheme are prepared.

Some changes, where supporting regulations are not needed, will commence on 1 August 2008. These changes are summarised below.

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

Environmental Planning and Assessment Amendment Act 2008

Changes to the *Environmental Planning and Assessment Act 1979* (EP&A Act) that will commence on 1 August 2008 are as follows:

Section 22 committees

New procedures are introduced for committees established under section 22 of the EP&A Act.

Increased maximum penalties for carrying out work without authorisation

The maximum penalty for the erection of a building or the carrying out of subdivision work without a construction certificate or without the appointment of a principal certifying authority is increased from 300 penalty units to 1000 penalty units (i.e. \$110,000) (section 81A(7)).

Evidence of payment of long service levy

The subjective requirement for accredited certifiers or councils to be satisfied that the long service levy has been paid before forwarding a complying development certificate to the applicant has been removed. The change means that the long service levy must be paid and that certifying authorities should have clear, objective, evidence that the payment has been made before forwarding the complying development certificate to the applicant (section 85A(10A)).

New provisions in environmental planning instruments to facilitate the issue of subdivision certificates by accredited certifiers

Environmental planning instruments that identify the types of subdivision certificates that can be issued by an accredited certifier can now also place restrictions on the issue of such certificates (section 109D).

Such restrictions could include the requirement for an accredited certifier to consult with the consent authority prior to the issue of a subdivision certificate.

New regulation-making power

Regulations will be able to be made for the purposes of Part 4A of the EP&A Act regarding documents to be provided, and matters to be notified, to the consent authority, council and the certifying authority—including applications for Part 4A certificates, the form and content of Part 4A certificates and the manner in which complaints in respect of development are to be dealt with by certifying authorities (section 109Q(1)(a) and (c)–(e)).

Commencement of this amended section will enable regulations to be prepared requiring consent authorities and certifying authorities and councils to keep written records about any written or verbal complaints received in relation to development, of any action taken in response to these complaints and any responses received in relation to that action, and requiring them to respond in writing to such written complaints.

Amended section 157 will also enable regulations to be made in respect to the documents to be provided, and matters to be notified, to a consent authority, council or certifying authority. It is intended to make regulations to provide for a council to give a certifying authority access to any documents required for the purposes of determining an application for a complying development certificate. Future regulations will also require a council to give a principal certifying authority notice of any enforcement action by the council within a specified time period.

The regulations described above will not commence on 1 August 2008, but the sections of the EP&A Act enabling these regulations to be prepared will commence and the Department will provide further advice to councils, accredited certifiers and the community before those regulations are made.

Clarification of when building or subdivision actions can be brought

Amendments to section 109ZK clarify the period during which a building action or subdivision action may be brought if no occupation certificate has been issued for the development. A building action may not be brought in relation to any building work in a case where no final occupation certificate is issued more than ten years after the last date the building work was inspected by a certifying authority and, if no such inspection has been conducted, the date on which that part of the building where the building work was carried out is first occupied or used.

This amendment is consistent with the provisions of the *Building Professionals Act 2005* (BP Act) regarding the insurance cover accredited certifiers are required to maintain.

This amendment does not apply to any building work or subdivision work commenced before 1 August 2008 (clause 133 of Schedule 6).

Records of missed inspections

The requirement for a certifying authority to notify the Building Professionals Board of missed section 109E(3)(d) inspections is removed from the Environmental Planning and Assessment Regulation 2000 (clause 162C(5)). Accredited certifiers are still required to keep a record of such inspections, under the BP Act, and to inform the person who appointed the certifying authority and the principal contractor of the missed inspection.

Matters relating to strata certification

New sections are inserted into *Strata Schemes (Freehold Development) Act 1973* and *Strata Schemes (Leasehold Development) Act 1986* (the Strata Legislation) enabling regulations to set out inspections that are required to be carried out before a strata certificate is issued. The Department will advise councils, accredited certifiers and the community before regulations setting out the required inspections are made.

A further amendment to the Strata Legislation applies the provisions of Parts 7 and 8 of the BP Act to accredited certifiers who issue strata certificates. This will ensure the Building Professionals Board has full authority in relation to accredited certifiers who carry out functions under the Strata Legislation.

Building Professionals Amendment Act 2008

The changes to accreditation and disciplinary provisions the BP Act that will commence on 1 August 2008 are as follows:

New definitions

Section 3(1) is amended to define a whole range of new terms used in the provisions which are starting in the *Building Professionals Amendment Act 2008*, including ‘accreditation holder’ and ‘certification work’. Many of the definitions, however, will have no effect until the remaining provisions of the *Building Professionals Amendment Act 2008* start.

Amended accreditation procedures

Section 4 of the BP Act is amended to enable the preparation of different accreditation schemes in relation to accredited certifiers or building professionals. The amendments also clarify that the Building Professionals Board can determine an application for accreditation after the application has been taken to have been refused because it was not dealt with in the required 60 days (section 6(9)–(11)).

Changes allowing urgent action to be taken by the Board against a certifier

The Building Professionals Board can suspend or cancel an accredited certifier’s certificate of accreditation if the Board is of the opinion that the person is not a fit and proper person to hold a

certificate of accreditation (section 8(2)(g)). The Board will have to give the accredited certifier prior written notice of its intention and give the accredited certifier an opportunity to make submissions in accordance with sections 8(4) to 8(6) of the BP Act.

The circumstances in which the Board can take urgent action to suspend or place conditions on an accredited certifier's certificate of accreditation have also been extended (section 12) to include where the Board is satisfied that the accreditation holder has persistently contravened the BP Act, the EP&A Act, the Strata Legislation or any regulations under those Acts.

Section 15 has also been amended to allow the Board to extend a period of suspension for a further period or periods, each of not more than eight weeks, where the complaint that results from the matter has not been disposed of, without the extension having to be approved by the President or Deputy President of the Board.

Improved processes relating to disciplinary matters

Upon receipt of a complaint against an accredited certifier, the Board can decline to consider the complaint until any further particulars that it has required are supplied by the complainant (section 21(4)). The Board must inform a certifier about a complaint within 28 days of receiving the complaint or within 28 days of receiving further particulars requested from the complainant (section 21(5)(a)). The Board may also use its investigation powers to obtain evidence regarding a complaint at an early stage (section 21(5)(b)).

The Board can also decide, at any time after receiving a complaint, to take no further action in relation to the complaint (section 22(1)). In making such a decision, the Board must give the complaint and the accreditation holder concerned written reasons for its decision (section 22(2)).

Following the preparation of a report into an investigation of a complaint against an accredited certifier, a copy of the report is not to be given to the Board to consider until the accredited certifier has had a chance to make submissions. The certifier now has 21 days to make those submissions (it was previously 28 days). These submissions must accompany the report to the Board.

Previously, such reports were provided to the Board and the accredited certifier at the same time.

The power of the Board and its authorised officers to obtain evidence now extends to matters being dealt with in connection with proceedings before the Administrative Decisions Tribunal (sections 48(1), 49(1) and 57(1)).

Increased powers of the Board to make disciplinary findings against accredited certifiers

Prior to 1 August 2008, if the Board was satisfied that an accredited certifier would be found guilty of professional misconduct, the Board had to refer

the matter to the Tribunal. The Board is now able to deal with those matters itself or may still refer any such complaint to the Tribunal (section 31).

If the Board makes a finding of unsatisfactory professional conduct or professional misconduct the Board can now impose the same range of sanctions as are available to the Tribunal, including suspension or cancellation of a certificate of accreditation and a maximum fine of \$110,000 (section 31(4)).

Some provisions of the new sections 31(4) and section 34(2) will have no effect until the Board starts to accredit bodies corporate, for example, section 31(4)(d), 31(4)(j) or 31(4)(k) and the corresponding subsections of section 34(2).

Savings and transitional provisions

The amendments outlined above in relation to complaints and disciplinary matters do not apply to complaints or audit investigations where the investigation report has been given to the affected accredited certifier before 1 August 2008 (clause 10 of Part 3 of Schedule 2). The existing provisions will continue to apply to these complaints and audits.

Regulations for terms of contracts between accredited certifiers and applicants

Regulations can be made to provide that a contract entered into by an accredited certifier relating to their appointment as a principal certifying authority or the carrying out of certification work by the accredited certifier must contain certain provisions or may not contain certain provisions (section 73A(1)). No such regulations are proposed to commence on 1 August 2008. Any such regulations will not apply to certification work carried out on behalf of a council by a certifier employed by the council (section 73A(3)).

Further information

The Amendment Acts 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 bbp@bbp.nsw.gov.au.

Authorised by: Sam Haddad, Director-General

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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