



Circular	PS 13-003
Issued	18 March 2013
Related	PS 12-003

Proclamation of certain provisions of the EP&A Amendment Act 2012

Introduction

The purpose of this circular is to advise councils, accredited certifiers, applicants and the public of the proclamation of certain provisions of the *Environmental Planning and Assessment Amendment Act 2012* (the "Amendment Act") on 1 March 2013.

The amendments to the *Environmental Planning and Assessment Act 1979* (the "EP&A Act"):

- relate to the purpose, status and content of development control plans (DCPs), and how they are to be taken into account during the development assessment process
- extend the types of documentation in relation to which an indemnity for breach of copyright is available
- will streamline the assessment of development on bush fire prone land
- ensure that certifiers have power to impose a developer contribution for all development where a contribution is required
- allow compliance certificates to be issued by appropriate persons (to be identified by the regulations)
- provide for the transfer of records when a principal certifying authority is replaced, and
- allow costs relating to investigations, and the preparation of documentation, in connection with the issue of an order under the EP&A Act to be recovered – the amount of such costs is capped at \$1000 and \$500 respectively.

The amendments to the *Building Professionals Act 2005* (the "BP Act"):

- allow the Building Professionals Board to require ongoing assessment of accredited certifiers and to suspend or cancel their accreditation as a result of that assessment
- require previous disciplinary action to be taken into account when determining what action should be taken against an accredited certifier in relation to a complaint
- allow an accredited certifier to issue compliance certificates where an accredited certifier has

- been involved in the design or carried out work on the particular aspect of the development, and
- insert a requirement for accredited certifiers to enter into written contracts in relation to certification work and for such contracts to contain the matters specified in the regulations.

Consequential amendments were also made to the *Environmental Planning and Assessment Regulation 2000* (the "EP&A Regulation") and the *Building Professionals Regulation 2007* (the "BP Regulation") to give effect to the amendments in the Amendment Act.

Outline of the changes to the EP&A Act

Below is an outline of the changes to the EP&A Act and EP&A Regulation. A more detailed explanation of the changes to the EP&A Act relating to certification and the amendments to the BP Act and BP Regulation are outlined in an [Information Sheet](#) published by the Building Professionals Board.

Changes to the purpose, status and content of DCPs

When DCPs were first introduced around 30 years ago, they were intended to be flexible guidelines which complemented the controls provided by a local environmental plan (LEP). A council's LEP is a legal document which is meant to be the primary instrument to guide local development.

Following a number of recent court cases, councils have felt obliged to treat DCPs as inflexible and rigid rule-books which must be consistently applied when considering development applications. This has caused delays and added to the complexity of the planning system.

DCPs are increasingly containing controls which are not consistent with those in the council's LEP. This adds significantly to development assessment times and red tape in the planning system.

These provisions change the way a consent authority (in most instances the council) is to consider a DCP when assessing a development application. The objectives of the changes are to:

- reinforce the purpose and status of DCPs as guidance documents used in local planning decision-making, and
- introduce flexibility in the way in which provisions in DCPs are applied by consent authorities when assessing development applications

The Amendment Act removes the direct conflicts between LEPs and DCPs, which have been a barrier to delivering new housing.

Purpose and status of development control plans

The Amendment Act makes it clear that the principal purpose of a DCP is to provide guidance to a consent authority and to people who are proposing to undertake development on land to which the DCP applies.

A planning authority may prepare a DCP to:

- give effect to the aims of an environmental planning instrument (for example, an LEP) that applies to the development
- facilitate development that is permissible under an environmental planning instrument, and
- achieve the objectives of land zones under an environmental planning instrument.

Returning DCPs to guideline documents

The Amendment Act returns the status of DCPs to their original purpose as a guideline and confirms the status of LEPs as the primary statutory planning document for an area—providing the permissibility of land uses in a particular zone and principal development standards (for example, height, floor space ratios and subdivision standards).

DCPs will retain an important role in the planning system as guidelines for development and must still be considered by councils in assessing development applications. They are not being turned off.

The Amendment Act reinforces that the provisions contained in a DCP are not statutory requirements and are for guidance purposes only.

The Amendment Act does not specify how much weight should be given to a DCP. Instead, the weight a consent authority gives to a DCP in assessing a development application will depend on a number of factors, including whether the DCP provides a sensible planning outcome that is consistent with other policies, including all council LEPs.

Flexible evaluation of development applications

The Amendment Act introduces flexibility in the way in which provisions in a DCP are to be considered by a consent authority when assessing a development application.

Consent authorities now have more power to be flexible and consider innovative solutions when assessing development proposals, helping to create good planning outcomes.

Under the changes, if a development application complies with the provisions of a DCP, a consent authority is not able to apply more onerous standards.

Similarly, if a development application does not comply with provisions in a DCP, a consent authority must be flexible in the way it applies the controls and also allow for reasonable alternative solutions to achieve the objectives of those standards.

A consent authority may only consider the DCP's development standards in connection with the assessment of the particular development application before it.

Savings Provisions

The provisions in the Amendment Act relating to DCPs commenced on 1 March 2013. The changes apply to the determination of development applications made after that date.

Relationship with existing development control plans

There is no need for councils to amend or prepare new development controls because of the Amendment Act's changes.

Nothing in the Amendment Act changes the application of a council's existing DCP. The changes concern only the purpose and status of a DCP and the way in which a council is to use it when assessing development applications.

Extension of indemnity for breach of copyright

Copyright may exist in documents submitted as part of the development assessment or plan-making processes under the EP&A Act.

As an example, architectural plans are protected by copyright under the Commonwealth *Copyright Act 1968* (the "Copyright Act").

In relation to such documents, the Copyright Act provides that the copyright owner (usually the architect) has the exclusive right to do certain acts in relation to those documents, including to reproduce or publish the plans and to make the plans available online.

With certain limited exceptions, it is unlawful for another person to do any act (or authorise the doing of any act) which is the exclusive right of the copyright owner, unless that person has a licence from the copyright owner.

This proves problematic for councils given the requirements for documents to be made publicly available as part of the development assessment and plan-making processes under the EP&A Act.

Current position

In response to this issue, the EP&A Act and the EP&A Regulation contain provisions which provide an indemnity for breach of copyright in relation to the use of certain documents.

Under those provisions, the applicant or proponent (as applicable) indemnifies all persons against any claim for breach of copyright for using the following documents in accordance with the EP&A Act:

- a development application and accompanying documents
- a complying development certificate application and accompanying documents
- an environmental impact statement under Part 5 of the Act.

Summary of the changes

Given the significant concern raised by councils in relation to this issue, the Government has sought to extend the existing indemnity provisions to cover other types of documents which may be required to be exhibited or made available under the EP&A Act.

The Amendment Act inserts a new provision into the EP&A Act which continues to provide an indemnity in relation to development applications, applications for complying development certificates and Part 5 environmental impact statements.

However, under the changes, the EP&A Act will now also provide for an indemnity in relation to the use of documents that are part of the following 'planning matters':

- an application for approval, or to modify an approval, for State significant infrastructure
- a transitional Part 3A project or concept plan application (or a request to modify an approval or concept plan) and any environmental assessment or report under the former Part 3A
- an environmental impact statement (including any preferred infrastructure report) under Part 5.1
- a planning proposal under Part 3, and
- a planning agreement.

Generally, the indemnity is provided by the applicant or proponent. The regulations may also identify other planning matters in relation to which an indemnity for breach of copyright is provided.

Extent of indemnity

It is important to note that the indemnity applies only to the use of documents for the purposes of the EP&A Act. It does not apply to the reproduction or distribution of copyright material under the *Government Information (Public Access) Act 2009*.

Also, the EP&A Act cannot overrule the Commonwealth Copyright Act. Rather, the Amendment Act expands the statutory copyright indemnity available to councils to cover a wider range of documents required to be made publicly available under the EP&A Act.

Changes relating to bush fire prone land

The EP&A Act includes provisions relating to bush fire prone land. While the provisions in the Amendment Act that relate to the assessment of development on bush fire

prone land have been proclaimed, the necessary regulations have not been made.

The changes allow the Rural Fire Service Commissioner to update bush fire prone land maps and will allow an exemption from assessment under s79BA of the EP&A Act where bush fire measures are addressed at subdivision.

The provisions will apply to urban release areas in the first instance. Relevant councils have been contacted and have provided input into mapping release areas for the purposes of the provisions.

Changes to the requirements for occupation certificates

The amendments to the EP&A Regulation include a change to the requirements for occupation certificates.

The amendments require that an occupation certificate must not be issued unless the design and construction of the new building, or any part of the new building that is completed, are not inconsistent with the development consent or complying development certificate.

A reference to development consent includes a reference to a construction certificate that is taken to form part of the development consent.

The changes only apply to the issue of occupation certificates where the development consent or complying development certificate was issued on or after 1 March 2013.

Further Information

A copy of this circular is available at <http://www.planning.nsw.gov.au>

A copy of the Amendment Act is available at <http://www.legislation.nsw.gov.au>

For further information please contact the Department of Planning and Infrastructure's information centre on 1300 305 695.

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.

© State of New South Wales through the Department of Planning & Infrastructure
www.planning.nsw.gov.au

Disclaimer: While every reasonable effort has been made to ensure that this document is correct at the time of publication, the State of New South Wales, its agencies and employees, disclaim any and all liability to any person in respect of anything or the consequences of anything done or omitted to be done in reliance upon the whole or any part of this document.