

BUILDING PROFESSIONALS ACT 2005

The BPB is pleased to report that the Building Professionals Act received assent on 7 December 2005. The making of the Act is a major step in the formal creation of the Building Professionals Board and will result in a new framework for accreditation and investigation of private certifiers in NSW.

The Building Professionals Board will accredit all private certifiers to issue construction, occupation, subdivision, compliance and complying development certificates under the *Environmental Planning and Assessment Act 1979* (EP&A Act) and *Strata Schemes (Freehold Development) Act 1973* and *Strata Schemes (Leasehold Development) Act 1986*. The Board will also investigate complaints against private certifiers and audit private certifiers and councils in their certification role.

The Act introduces:

- a single body to accredit private certifiers, investigate complaints against certifiers and audit private certifiers and certifying authorities
- new requirements for these accreditation, complaints investigation and auditing functions
- new obligations on, and rights of, private certifiers
- other improvements to the certification system (amendments to the EP&A Act)

The BPB will soon release explanatory information on the changes that are being brought about by the new legislation. This information will be available on the BPB's website (www.bpb.nsw.gov.au)

A copy of the Building Professionals Act 2005 is available at www.parliament.nsw.gov.au.

When will the changes come into effect?

The changes will be phased in so that the transition from existing accreditation bodies and schemes to the administration of all accreditations and investigations by the BPB occurs in a manageable way.

Some sections of the Act will be commenced immediately. These relate to amendments to the EP&A Act, including a provision to make it clear that construction certificates cannot be issued retrospectively, and enabling regulations to be made under the Act.

The remaining changes will not commence until Board members are appointed and the accreditation scheme and the Building Professionals Regulation come into effect, in the first half of 2006. Existing authorised accreditation bodies (Engineers Australia, Planning Institute of Australia, Professional Surveyors' Occupational Association and the Department of Planning) will continue to administer their accreditation schemes under the EP&A Act until that time.

Page 5

Practice advice and reminders

Page 8

News in brief

Page 9

Acknowledgement

Future changes

Proposals continue to be developed for the accreditation of council certifiers. These proposals will be subject to further consultation with local government and other stakeholders. Legislation is required to implement any proposal.

The BPB is soon to carry out consultation on a number of other matters that were raised by stakeholders during the development of the Building Professionals Bill. These relate to the possibility of legislating to make provision for corporate private certifying authorities, and the issue of close relations between certifiers and the builder/developer.

BPB WEBSITE ONLINE

The BPB website www.bpb.nsw.gov.au went live in late October. Visitors to the site will find a wealth of information to assist accredited certifiers and the general public. One key change is the expanded Register of Accredited Certifiers for those accredited under the Accreditation Scheme for Building Surveyors and Allied Professions (BSAP).

Users will find the new Register easier to navigate. The new format has better search options, allowing users to search for accredited certifiers by grade of accreditation, suburb and/or name. This increased flexibility will ensure that specific information is sourced quickly.

UPCOMING DEVELOPMENTS

A draft accreditation scheme, to be administered by the BPB, which will replace the existing four accreditation schemes, will be on exhibition for public comment in the New Year together with the exhibition of a draft Building Professionals Regulation.

OTHER PROGRESS

Twelve months have passed since the first edition of the BPB Bulletin was released in December 2004. In addition to the above developments, over the past year the BPB has carried out a successful recruitment campaign, resulting in increased staff levels. As a consequence:

- 90 complaints under the BSAP Accreditation Scheme have been finalised by the BPB in 2005, 6 of these matters were/are being referred to the Administrative Decisions Tribunal (ADT),
- the number of accredited certifiers accredited under the BSAP scheme has increased from 165 to 196 (as shown in Table 1), and
- 37 audits of private certifiers and councils were undertaken and 4 of those matters have been recommended for referral to the ADT.

Table 1: Comparison of the number of certifiers accredited under the BSAP accreditation scheme

Grade	October 04	November 05
Accredited Certifier (AC)/Principal Certifying Authority (PCA) Grade 1	22	28
AC/PCA Grade 2	53	61
AC/PCA Grade 3	80	100
AC Grade 4	2	1
AC – Fire Safety Engineer	8	6
TOTAL	165	196

RECENT CHANGES AFFECTING PRIVATE CERTIFIERS

Building Sustainability Index

On October 1, 2005, amendments to the Environmental Planning & Assessment Regulation 2000 (EP&A Regulation) in relation to the Building Sustainability Index (BASIX) came into effect. The definition of "BASIX affected building" was changed and now means any building that contains one or more dwellings, but does not include a hotel or motel. Some of the amendments have a direct effect on accredited certifiers, notably the need to be satisfied that each BASIX commitment, whose fulfilment they are required to monitor, has been fulfilled prior to issuing an occupation certificate, whether *interim or final*. Previously, accredited certifiers were only required to be satisfied about such matters before a final occupation certificate could be issued. Please refer to the BASIX website (www.basix.nsw.gov.au) for more details.

Contribution plans and complying development

Since 1997, the EP&A Act has required Council contributions plans, in relation to an application made to an accredited certifier for a complying development certificate (CDC), to specify whether or not the accredited certifier must impose a condition requiring a contribution in relation to the complying development.

Councils may not have included the requirement to attach the condition in their exempt and complying development Local Environmental Plan (LEP) or Development Control Plan (DCP). It is therefore incumbent upon accredited certifiers to check the relevant council's contributions plan to determine its requirements before issuing a CDC and to attach any required conditions.

The BPB also recommends to Councils that, where they decide to require a monetary contribution or a levy for a CDC, they include the required condition in their exempt and complying LEP or DCP or a note indicating that the contributions plan requires a condition to be imposed on complying development certificates. This move will ensure that CDCs issued in the council's local area are subject to all relevant conditions.

The Department of Planning has produced a series of practice notes on the changes to the development contributions provisions in the EP&A Act and regulation (http://www.planning.nsw.gov.au/planning_reforms/practicenote.asp)

Electronic submission of forms

Section 153 of the EP&A Act has recently been amended to allow for the lodgement of forms and notices by electronic means.

Any document required under the Act to be given or served on a person may now be done by sending it by facsimile or electronic transmission (including, for example, the Internet) to the person in accordance with arrangements indicated by the person as appropriate for transmitting documents.

As a result of this amendment, documents such as notices of determination in relation to construction certificates and occupation certificates, and notices of appointment as the principal certifying authority (PCA), may be sent to a council by electronic means, subject to any requirements of the council for electronic submission.

Accredited certifiers should note, however, that such electronic submissions must satisfy the notice requirements of clauses 130 (4), 142 (2), 151 (2), and 160 (2) of the EP&A Regulation in terms of the documentation required to accompany that notice.



It is not always obvious that a building is in a heritage area or of heritage value, therefore it is critical that certifiers check Council's Exempt and Comply Development LEP or DCP, or SEPP 60 (where applicable).

COURT DECISIONS

Land and Environment Court Decision-Warringah Council v Moy [2005] NSWLEC 416

Many accredited certifiers will now be aware of the above decision of the Land and Environment Court, which was handed down on 29 July 2005.

Briefly, the case involved a prosecution action commenced by the council against Mr Moy, an accredited certifier, in relation to a construction certificate issued by Mr Moy for building work in Brookvale. The council alleged that the certifier was guilty of an offence against the EP&A Act by issuing a construction certificate for plans that were not consistent with the development consent, in breach of s.81A (5) of the Act and clause 145 (1) (a) of the EP&A Regulation. The Council also alleged that the issue of the construction certificate also constituted an offence under s.109ZH (1) (b) of the EP&A Act, in that it involved a false and misleading statement in relation to a Part 4A certificate.

Clause 145 (1) (a) of the EP&A Regulation provides:

A certifying authority must not issue a construction certificate for building work unless it is satisfied of the following matters:

(a) that the design and construction of the building (as depicted in the plans and specifications and as described in any other information furnished to the certifying authority under clause 140) are not inconsistent with the development consent.

The Court held that provided a certifier was satisfied, on a subjective basis, of the matters set out in this clause, a construction certificate could be validly issued. Having regard to this interpretation and the evidence presented in the case, the Court concluded that the certifier was entitled to be acquitted of both charges.

The Prosecution had argued that unless an objective standard was applied to the test of "satisfied" in clause 145, the restrictions on issuing a construction certificate contained in the EP&A Regulation would effectively be removed. In dismissing this argument, the Court had regard to all of the provisions of the EP&A Act relating to private certification, and in particular to "...the extensive supervision of private certifiers including the machinery for disciplinary action to be taken in respect of professional misconduct".

In respect of this statement by the Court, certifiers are reminded that s.109R of the EP&A Act defines *unsatisfactory professional conduct* and *professional misconduct* to include conduct (whether consisting of an act or an omission) occurring in connection with the exercise of an accredited certifier's functions as a certifying authority that falls short of the standard of competence, diligence and integrity that a member of the public is entitled to expect of a reasonably competent accredited certifier.

This definition establishes a standard of performance that is to be assessed on an objective basis. In other words, an accredited certifier could be found guilty of unsatisfactory professional conduct or professional misconduct despite there being no specific breach of the EP&A Act. Accredited certifiers should have regard to the standards of conduct required by the disciplinary provisions of the EP&A Act when carrying out any certifying function, including the issue of construction certificates.

The Department is considering possible legislative amendments in light of the Court's decision in this case.

PRACTICE ADVICE AND REMINDERS

Immediately endorsing a construction certificate application with the date of receipt

Under clause 145 (1) (b) of the EP&A Regulation, a certifying authority is required to be satisfied that a proposed building will comply with the version of the BCA in force at the time the application for a construction certificate for the building was made, before issuing the construction certificate.

Under clause 98 (1) (a) of the EP&A Regulation, as a condition of all development consents, building work must be carried out in accordance with the requirements of the BCA. Clause 98 (3) specifies that the reference to the BCA is a reference to the BCA as in force on the date the application for the relevant construction certificate was made.

Clause 139 (2) of the EP&A Regulation requires that, immediately after receiving an application for a construction certificate, the certifying authority must endorse the application with the date of its receipt.

By endorsing the date of receipt on the application, the certifying authority is clarifying which version of the BCA is applicable (as the BCA currently changes once a year). The version of the BCA in force on the date the application was made applies even if the construction certificate is issued after the date the new version of the BCA came into force.

This practice is important because there can be significant changes in the BCA from one version to the next and it is impractical to make a building comply with new requirements that may come into force during the construction of the building.

Documentation required to be submitted with construction certificates

The documents accredited certifiers must provide to Council within two days after the date of determination of a construction certificate (as required by clause 142 of the EP&A Regulation) are copies of:

- the application for the construction certificate
- the determination of the construction certificate
- the construction certificate
- the plans and specifications that relate to the construction certificate including reports that relate to alternative solutions under the BCA, the whole copy of consultant/expert reports and all Part 4A compliance certificates
- a fire safety schedule or fire link conversion schedule as appropriate
- any documentation associated with an objection under clauses 187 or 188 of the EP&A Regulation
- any additional documentation required by the certifier under clause 140 of the EP&A Regulation

- documents lodged with the application for the construction certificate, such as certificates from professional engineers or industry specialists, and all Part 4A compliance certificates under the EP&A Act, and
- any conditions adopted from the Fire Commissioner's initial fire safety report under clause 144. If the initial fire safety report is attached to the construction certificate application, a copy of the report should be provided to Council.

Note: With any alternative solutions, especially for those that relate to fire safety, a copy of the conclusion or recommendation of the report is not sufficient. The complete report (incl. fire engineering or fire safety matters) and any calculations, attachments or appendices to the report, must be submitted to the council.

When to pay the long service levy

Accredited certifiers are reminded of the requirement under s.109F (1) (b) of the EP&A Act to be satisfied that any long service levy payable under s.34 of the *Building and Construction Industry Long Service Payments Act 1986* has been paid before a construction certificate can be issued.

Accredited certifiers should familiarise themselves with the requirements of the *Building and Construction Industry Long Service Payments Act 1986* and *Building and Construction Industry Long Service Payments Regulation 2000* to ensure the cost of erecting a building and the long service levy payable are determined appropriately. Particular attention should be paid to these requirements when dealing with staged developments where the nature of the building works require the issue of multiple construction certificates.

Principal certifying authorities and section 109E of the EP&A Act

Accredited certifiers who have been appointed as the PCA for building work are reminded of the requirements under s.109E (3) of the EP&A Act to be satisfied of certain matters before work commences on the site:

- that a construction certificate or CDC has been issued, and
- that the principal contractor for the work holds the appropriate licence and insurance or that the owner-builder is the holder of the appropriate licence, as required by the Home Building Act 1989

To ensure these requirements are met before work commences on the site, it may be appropriate for the certifier to require documentary evidence of these matters to be provided before accepting the appointment as the PCA.

New shopping centres, the appointment of a PCA and occupation certificates

Recently the BPB has been asked to provide advice relating to new shopping centres and appointment of PCAs.

Example scenario:

- A development consent is granted for the erection of a shopping centre building. The development consent only approves the "shell" of the building. The development consent for the "shell" does not approve the fit out of individual shops in the building.
- A construction certificate is issued for the "shell" of the building. The building work for which this construction certificate is issued includes the building envelope and all structural elements and services.
- A PCA is appointed for the development.
- The council's LEP and DCP do not allow the building work involved in the fit out of all or only certain types of shops (for example, food shops and body piercing premises) to be carried out as exempt or complying development. Separate development applications are therefore lodged and granted for those fit outs during the construction of the "shell". Construction certificates for the building work involved in the fit out of these shops are also issued as the "shell" is being constructed.
- The building work involved in the erection of the "shell" and the fit out of the above-mentioned shops is carried out at the same time.

Advice:

1. Is the PCA for the “shell” also required to be the PCA for the various fit outs?

No. As there is more than one development consent (one for the “shell” and consents for the various fit outs), the person having the benefit of the development consent can choose a different PCA for each development consent.

2. Is a separate development application required for each shop?

A single development application could seek the council’s approval to carry out the building work for the fit out of one, some or all of these shops. It is the applicant’s choice as to how many shops they wish to include in the development application.

3. Can a council condition a development consent to require a separate development consent for certain types of fit outs?

Councils may be able to use the staged development consent provisions under sections 80 (4) and 80 (5) of the EP&A Act to condition the development consent for the “shell” so as to require the building work for the fit out of certain types of shops to be the subject of another development consent.

4. If Council does not require/does not issue separate development consents for the fit out of each shop, can separate PCAs be appointed for each shop fit out?

No. Whilst separate construction certificates can be issued for each shop fit out and those construction certificates can be issued by different certifying authorities, only one PCA can be appointed for each development the subject of a development consent or complying development certificate (see s.109E of the EP&A Act).

5. Can a final occupation certificate for the “shell” be issued prior to completion of the fit out of the shops?

Yes, the PCA for the “shell” development consent can issue a final occupation certificate just for the “shell” before the building work involved in the fit out of the shops has been carried out, provided that all the relevant requirements of the EP&A Act and EP&A Regulation have been met.

However, in circumstances where construction work in relation to the fit out of part of the building is still being carried out, it would be difficult for the PCA to be satisfied that the building is suitable for occupation or use in accordance with its classification under the BCA.

An occupation certificate is required to be issued for each development consent – for the “shell” and for the shop fit outs in this scenario. The shops cannot be occupied until an occupation certificate has been issued in relation to the shops.

In this case it may therefore be appropriate for the PCA to issue an interim occupation certificate in relation to the “shell” of the building and wait until final occupation certificates for the shop fit outs have been issued before issuing a final occupation certificate for the “shell”.

PCA signage required

PCAs are reminded that under the EP&A Regulation, signage at any site where they have been appointed PCA must be erected. Specifically, “A sign must be erected in a prominent position on any site on which building work, subdivision work or demolition work is being carried out” (clause 98A) containing the following information:

- the PCA’s name (not the company’s name)
- the PCA’s address and contact number
- the name and number of the principal contractor (if any), and
- stating that unauthorised entry to the work site is prohibited.

Note: PCAs are required to ensure that the signs are erected *and* maintained while the work is being carried out. Failure to comply currently attracts a maximum penalty of \$1100 (clause 227A of the EP&A Regulation.)



Expansion program currently underway at Westfield Parramatta. The development will link Westfield Parramatta to the Parramatta Transport Interchange (upgrading of train station and bus interchange is underway). The first stage is due to open late 2005, with the expansion program expected to finish in the first quarter of 2006.

NEWS IN BRIEF

Problems in the Japanese Construction Industry

A Japanese architect recently admitted to falsifying earthquake resistance data for numerous condominiums and hotels in various stages of completion. As a result, buildings have been evacuated and construction halted. An investigation is underway to ascertain how the falsified figures were not discovered until recently, including building certification companies and local government.

The situation in Japan highlights a number of issues relevant to all certifying authorities, including the need to maintain complete and accurate records of data that was relied on when making determinations. The BPB will be following the investigation in Japan and will provide further details in the next BPBulletin.

Complaint summaries

The BPB is currently compiling summaries of all complaints determined by the Department this year under the BSAP Accreditation Scheme, with a view to publicly releasing the information as an educational tool for accredited certifiers and councils. The summaries will not identify the names of accredited certifiers or complainants as there is no power to do this under the EP&A Act. The summaries will also assist the Department in developing continuing professional development requirements for certifiers.

Review of practice notes

Over the next 12 months, the BPB is proposing to conduct a review of existing practice notes and other advices the Department has issued in recent years in relation to the certification system. These practice notes and advices currently appear in *Guiding Development: better outcomes* and on the Department of Planning's website (www.planning.nsw.gov.au) as Act and Regulation notes, circulars and letters to stakeholders.

The BPB would like to up-date and, where possible, consolidate these advices into one easy-to-access circular format on its website. We will also be looking to produce circulars on matters that are not currently covered by existing advice.

The BPB will shortly forward information on this review to stakeholders seeking input into the current style of the practice notes and additional areas in relation to which you would like to obtain advice.

Review of building licensing

In the last Bulletin we noted the review of building licensing was underway. An issue paper will be released shortly and made available on the Office of Fair Trading's website. Interested parties are invited to make comment. Visit the Office of Fair Trading's website www.fairtrading.nsw.gov.au for more information.

ACKNOWLEDGEMENT

The BPB would like to thank the members of the State Assessment Committee (SAC) and Complaints Review Committee (CRC) for all their hard work and professionalism over the past year.

The SAC and CRC are important components in the Department's administration of the BSAP Accreditation Scheme.

SAC and CRC members (past and present):

Paul Anderson – Local Government and Shires Associations

Alan Host – Department of Planning

Tanya Antony – Development and Environmental Professionals' Association

Kerry Hunt – Development and Environmental Professionals' Association

Steve Barratt – Australian Institute of Building Surveyors (NSW Chapter)

Jonathan Lynch – Department of Planning

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Bryan Hardman – Australian Institute of Building Surveyors (NSW Chapter)

Feedback

In our first issue, readers were invited to comment on the Bulletin. The BPB would like to repeat that standing invitation. The BPBulletin is an invaluable means of disseminating information to our stakeholders and any suggestions on how to make the Bulletin even better are always welcome! Please email bpb@bpb.nsw.gov.au

Best Wishes of the Season

As another year draws to a close, we would like to thank all our stakeholders for their continued input and support. Best wishes for you and your families as you enjoy a peaceful holiday season.

Subscribing to the BPB Bulletin

To receive future issues of the Bulletin, please email: bpb@bpb.nsw.gov.au

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