

in this issue

Page 1

Planning Reform
Legislation Passes
Parliament

Page 2

Recent Changes Affecting
Certifiers and Councils

Page 3

Data on Certificates
Issued by Councils and
Accredited Certifiers

Page 4

Practice Advice and
Reminders

Page 7

Accreditation Updates

Page 9

News in Brief

Planning reform legislation passes Parliament

On 25 June 2008, the *Environmental Planning and Assessment Amendment Act 2008*, *Building Professionals Amendment Act 2008* and *Strata Management Legislation Amendment Act 2008* received assent. The passing of the Acts followed a lengthy consultation process, including the release of draft exposure Bills.

The amended Acts are available at www.legislation.nsw.gov.au. Associated documents are available at http://www.planning.nsw.gov.au/planning_reforms/index.asp:

- Planning reform Bill Guide
- Media release
- The Minister's statements outlining the Government's policy intentions in regard to certification, complying development, concurrences and referrals, joint regional planning panels and planning arbitrators.

Draft codes released

On 8 May 2008, the NSW Government released two codes and a community guide for public comment.

- NSW Housing Code – Community Guide
- NSW Housing Code, which outlines a simplification to the State's development approval system for housing and related residential developments.
- NSW Commercial Building Code, which outlines a simplification to the State's development approval system for some forms of commercial and industrial development and related ancillary developments.

The draft codes are available at www.planning.nsw.gov.au/planning_reforms/index.asp.

Commencement of the reforms

Some of the provisions of the Amendments Acts commenced on 1 August 2008. These relate to matters that do not require any supporting regulations to commence. A circular on these provisions is available at www.bpb.nsw.gov.au. A media release is available at www.planning.nsw.gov.au/mediareplan/fs20080801_739.html.

Further changes have been gazetted to commence on 1 September 2008. A circular on these provisions is available at www.planning.nsw.gov.au/planningsystem/practicenotes.asp



RECENT CHANGES AFFECTING CERTIFIERS AND COUNCILS

Transitional arrangements for exempt and complying development

The Department of Planning released a practice note, PN 08-003 *Transitional arrangements for exempt and complying development*, on 5 August 2008 to provide guidance to councils on exempt and complying development controls in new principal local environmental plans (LEPs) with reference to the State development codes.

The practice note provides guidance to enable councils to avoid expending resources unnecessarily in drafting the exempt and complying schedules during the rollout of the codes. The practice note also outlines the approach the Department requires councils to take with respect to exempt and complying schedules.

The Practice Note is available at:

http://www.planning.nsw.gov.au/planningsystem/pdf/pn08_003_exempt_complying_devt.pdf

Building Code of Australia 2008 amendment

The Department of Planning released a circular, BS 08-002 *Building Code of Australia 2008 amendment*, on 13 May 2008 to advise practitioners of certain changes to the Building Code of Australia and other BCA matters.

The Circular is available at:

http://www.planning.nsw.gov.au/planningsystem/pdf/brans/bs08_002_bca08_amendment.pdf

DISCIPLINARY PROCEEDINGS

Usually, a summary of recent disciplinary proceedings by the Board and the Administrative Decisions Tribunal (ADT) would appear in the BPBulletin after current news items. During the recent continuing professional development (CPD) sessions, the utility of the summaries were discussed by some participants. Participants noted that, while the actual decision documents could be quite long (especially with respect to ADT decisions) the summaries in the BPBulletin were so brief that a lot of important information and practice advice was being missed. As a result of the feedback, the BPB will now be publishing a separate newsletter dealing specifically with disciplinary decisions. This newsletter will provide more detail on each of the decisions and will be published as required.

Initially, the newsletter will be distributed to the same mailing list as the BPBulletin. If you would like to be removed from, or added to, the list please email the Board bpb@bpb.nsw.gov.au.

The BPB would like to thank the participants who made this suggestion and encourages accredited certifiers to contact the BPB with further suggestions to improve the distribution of information.

DATA ON CERTIFICATES ISSUED BY COUNCILS AND ACCREDITED CERTIFIERS

The NSW *Local Development Performance Monitoring: 2006/07* report, released in February 2008 by the Department of Planning, provides comprehensive statistics about the processing of development applications and complying development certificates, including the number of Part 4A certificates issued by councils and accredited certifiers. It has been compiled by the NSW Department of Planning.

The report can be found at:

http://www.planning.nsw.gov.au/planningsystem/pdf/local_performance_monitoring_2008.pdf

Data from the reports indicates that accredited certifiers issued approximately 37,000 certificates per year from 2003/04 to 2005/06, representing about 24% of all construction, occupation, complying development, subdivision and strata certificates issued. Data on the number of compliance certificates is not collected.

The tables below compare the number and proportion of certificates (excluding compliance certificates) issued by councils and accredited certifiers from 2003/04 to 2005/06. The tables also show that accredited certifiers issued:

- between 21% and 31% of all construction certificates in those years
- between 42% and 37% of all complying development certificates, and
- between 24% and 30% of all occupation certificates.

Table 1: Construction certificates issued 2003/04 to 2006/07

	Accredited certifiers	Councils
2003-2004	21500 (22%)	77412 (78%)
2004-2005	18557 (21%)	68697 (79%)
2005-2006	18718 (26%)	54181 (74%)
2006-2007	20673 (31%)	45234 (69%)

Table 2: Complying development certificates issued 2003/04 to 2006/07

	Accredited certifiers	Councils
2003-2004	6267 (42 %)	8562 (58%)
2004-2005	5964 (45 %)	7313 (55%)
2005-2006	6058 (48 %)	6640 (52%)
2006-2007	4159 (37%*)	6632 (59%)

*407 CDCs were not categorised by councils as being issued by either council or accredited certifiers

Table 3: Occupation certificates issued 2003/04 to 2006/07

	Accredited certifiers	Councils
2003-2004	8729 (24%)	27109 (76%)
2004-2005	11959 (27%)	32081 (73%)
2005-2006	12448 (30%)	29609 (70%)
2006-2007	13045 (30%)	30410 (70%)

PRACTICE ADVICE AND REMINDERS

When can complying development be carried out?

Complying development can only be carried out on land identified in an environmental planning instrument including council Local Environmental Plans (LEPs) and development control plans (DCPs). Complying development is usually not permitted on bushfire prone land, on flood prone land, or on other environmentally sensitive land. The Board receives a number of complaints year concerning accredited certifiers who have issued complying development certificates (CDCs) where the LEP or DCP does not allow complying development to occur, mainly it would seem due to lack of sufficient care being taken in the assessment process.

Section 84A(1) of the *Environmental Planning and Assessment Act 1979* (EP&A Act) allows a person to carry out complying development only if they have been issued with a CDC and the development is carried out in accordance with that certificate and in accordance with any provisions of the relevant planning instrument that applies.

Where the relevant planning instrument makes it clear that complying development is not permitted, it is the Board's view that the land owner cannot carry out the development by relying only upon the terms of a CDC that has been issued. In other words, an applicant cannot carry out the development as complying development if the planning instrument prohibits it even where a CDC has been issued.

Steps Council can take in relation to non-complying development

Once a council becomes aware that a CDC has been issued for development that is not complying development under its LEP or DCP, Council is encouraged to advise the land owner and the accredited certifier (who issued the CDC) in writing that the CDC does not comply with Council's complying development requirements and that the land owner cannot carry out the development without a development consent being issued by the council.

If the building/subdivision work has not commenced, Council should also advise the land owner that a development consent and construction certificate must be issued before the work can commence.

If the building work has already commenced or has been completed, the council should consider whether it will issue a notice under section 121H of the EP&A Act. Depending upon the work that has been carried out, the council may also wish to consider accepting a development application for the use of the completed works and/or a building certificate application under section 149A of the EP&A Act.

Where the accredited certifier has not publicly notified the granting of the CDC in accordance with section 101 of the EP&A Act and clause 137 of the Environmental Planning and Assessment Regulation 2000 (EP&A Regulation), the validity of the certificate could be challenged in the Land and Environment Court (in *Gosford City Council v Beville*, LEC 11 February 2003, a CDC was declared void and subsequent demolition orders made).

Whether or not the CDC has been publicly notified, if work has commenced the council may be able to bring proceedings against the person with the benefit of the development consent under section 123 of the EP&A Act for breach of section 84A(1) of the Act.

Steps Council can take in relation to the accredited certifier

Council can also consider bringing proceedings against the accredited certifier under section 123 of the EP&A Act for breach of the Act in issuing a CDC for development that is not complying development.

Council can lodge a complaint with the Board in relation to the conduct of the certifier. To lodge a complaint about the conduct of an accredited certifier, please contact the Board directly on 02 9895 5950 to discuss the matter. The Board's website www.bpb.nsw.gov.au also provides information about making a complaint to the Board.

The Board does not have power to request the land owner or the builder to rectify any building works approved by a CDC which do not comply with the complying development requirements for that local government area. The Board's powers relate only to disciplining the certifier where they have been found guilty of unsatisfactory professional conduct or professional misconduct.

Failure to take action – unauthorised occupation of a building

At a recent meeting, the Board's Disciplinary Committee considered a complaint lodged about the work and activities of an accredited certifier in his capacity as the principal certifying authority (PCA) for a development. The allegations claimed, amongst other things, that the building was occupied prior to the issue of an occupation certificate.

It was clear that the PCA had withheld the occupation certificate because of non-compliance issues with the building. It was also clear that the PCA was aware that the building was being occupied/used. The PCA had taken no apparent action to address the unauthorised use of the building.

The Disciplinary Committee recommended to the Board that the lack of timely and appropriate action by the certifier constituted unsatisfactory professional conduct because his actions fell short of the standard of diligence that is expected of a reasonably competent accredited certifier. The Board agreed with that recommendation and found the certifier guilty of unsatisfactory professional conduct.

Accredited certifiers have discretion in how they make various decisions under the EP&A Act. In situations similar to that described above, a certifier could issue a notice of intention to issue an order, or could take other positive steps to negotiate a resolution to the problem. Failure to initiate any action to address the problem will likely be viewed as unsatisfactory professional conduct and result in a disciplinary finding.

Old development applications for residential flat buildings

The Board's attention has been drawn to a recent inquiry in which an occupation certificate for a residential flat building was not accompanied by a Design Verification statement in accordance with State Environmental Planning Policy (SEPP) No 65.

Clauses 143A and 154A of the EP&A Regulation introduced a requirement for a design verification from a qualified designer to be obtained for a "residential flat development" as defined by SEPP 65 before a construction certificate and then an occupation certificate can be issued for the development.

These requirements apply to any development application (DA) for residential flat development made **on or after 1 December 2003**.

As a result, councils and accredited certifiers are reminded to check the date that the development application was made when asked to issue a construction certificate or an occupation certificate in relation to development consent for a residential flat development.

Please note that SEPP 65 has recently been amended. A circular on the amendment is available at <http://www.planning.nsw.gov.au/planningsystem/practicenotes.asp>.

Template for PCA sign

What are the requirements for PCA signs?

Accredited certifiers and councils are reminded of their obligation under clause 227A of the EP&A Regulation to ensure a sign is erected on a site, setting out information about the PCA, before work commences on a development for which they are the principal certifying authority. The information that must be included on the sign is the name, address and telephone number of the PCA. The sign must be placed in a prominent position, be rigid and durable and must be maintained at all times while the work is being carried out.

Clause 227A also places a requirement on the principal contractor for the work to erect a sign containing the telephone number on which they can be contacted at any time.

Clauses 98A and 136B of the EP&A Regulation also make it a condition of all development consents and complying development certificates that involve any building work, subdivision work or demolition work that a sign is erected. Those clauses require the sign to contain the name, address and telephone number of the PCA, the name and telephone number of the principal contractor and stating that unauthorised entry to the work site is prohibited.

The BPB included advice in Issue 4 to remind certifying authorities about these requirements. Despite the requirement of the EP&A Regulation and previous reminder, the BPB often encounters development sites for which no PCA sign is evident.

At every development site the PCA must ensure that a sign has been erected and conforms with the requirements of clause 227A. When the certification reforms to the EP&A Act and Regulation commence, it is expected that failure to erect and maintain a sign will be subject to on-the-spot fines (penalty infringement notice).

The requirement for on-site signs in the EP&A Regulation is intended to ensure members of the community are able to contact the relevant certifying authority and the principal contractor where issues arise on the site or inquiries about the development need to be made. Members of the public must be able to contact the principal contractor outside hours. In addition, the PCA is usually the first port of call when matters arise in relation to the construction work and PCAs must make themselves available to answer inquiries, deal with complaints and the like.

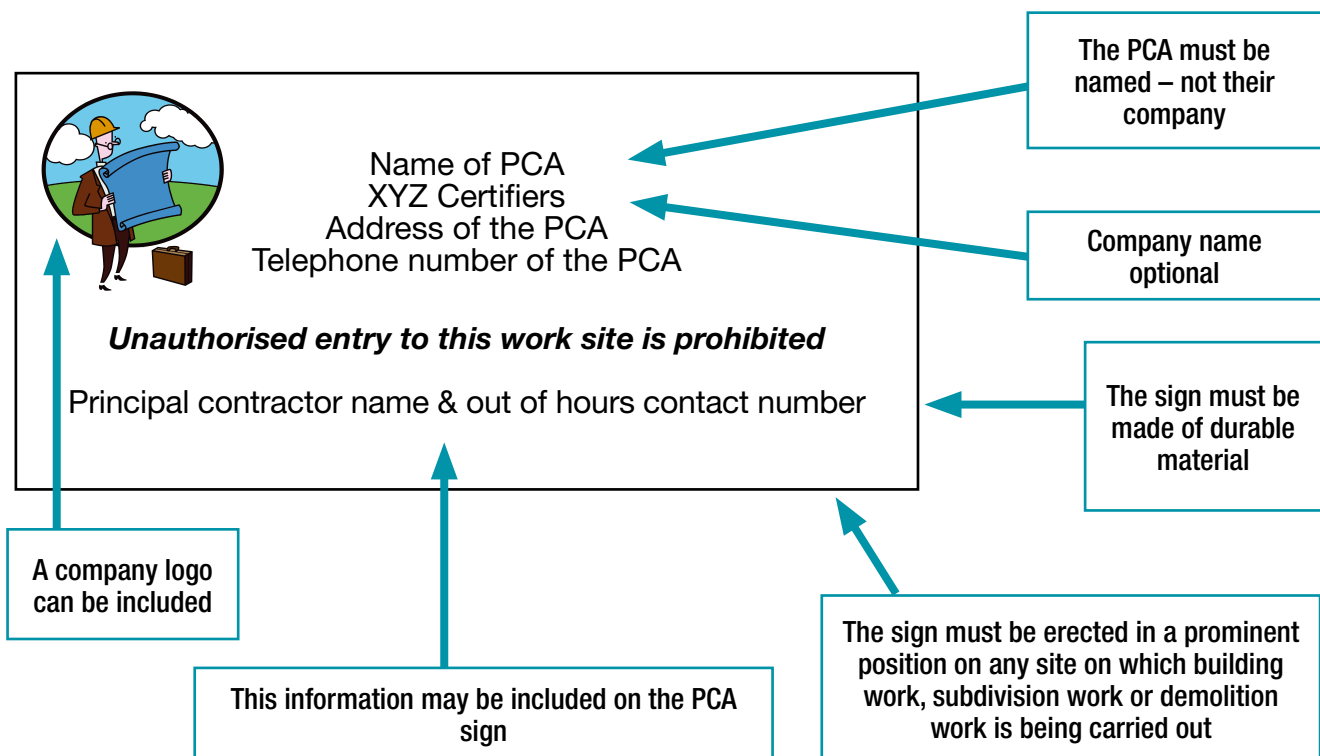
How can the PCA comply with the requirements?

The PCA sign should be visible from the street and should be protected from inclement weather, such as by laminating. The sign should be of a quality that will allow it to endure for the expected duration of the development.

While there is no requirement in the EP&A Act for a PCA sign to be professionally designed or even typed, PCAs must ensure the sign is legible, clear and uses font of a size to ensure it can be clearly seen by a person standing outside the site.

While clause 227A indicates that more than one sign containing the required information is not required, the BPB is aware of at least one certifier who makes it a practise to erect a number of signs where the size of the development site is significant, to ensure members of the public can access the information.

While clause 227A sets out the requirements for PCAs to meet, the BPB recommends that the PCA place all information on the PCA sign to satisfy the requirements of both of clauses 227A and 98A/136B. The following template is an example of a design certifying authorities can use to include the relevant information on the one sign so as to satisfy each of clauses 227A and 98A/136B.



ACCREDITATION UPDATES

Submitting incomplete applications for accreditation

The BPB has received a number of applications for accreditation and the renewal of accreditation that do not include all of the information and attachments that must be provided. Common problems include not submitting one or more of Forms 2-7 that must accompany the application for accreditation.

Accredited certifiers are reminded that under the *Building Professionals Act 2005* (BP Act), an application for accreditation and renewal of accreditation must be made in the form approved by the Board and be accompanied by such documents and information as the Board requires to determine the application.

The documents that must be included with an application are set out on the Board's website at <http://www.bpb.nsw.gov.au/certifiers/applyingforacredit.shtml>. If an applicant is unsure as to which documents must be submitted, they should refer to *Applying for accreditation: a guide*, available also at <http://www.bpb.nsw.gov.au/certifiers/applyingforacredit.shtml>.

Please ensure you have completed each relevant section of the application form, have signed each page of the form and have completed and attached each relevant additional document **before you submit** the application to the Board. There is a checklist at the end of the form to help you ensure you have included everything that is required.

Any application that does not include the required documents will be taken not to satisfy the requirements of the BP Act and will be returned to the applicant.

Missing insurance details for renewal of accreditation applications

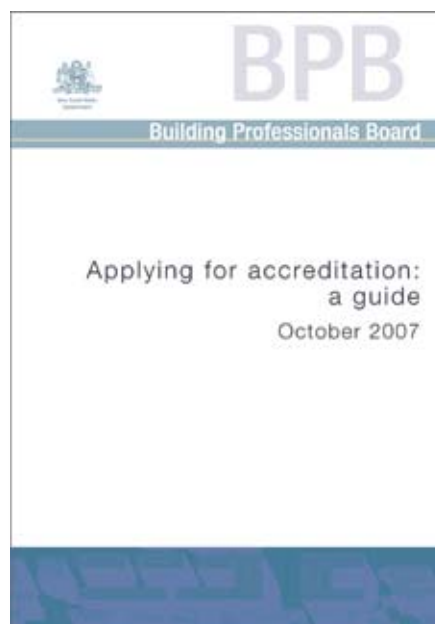
The Board has also been experiencing difficulties with insurance information provided with applications for renewal of accreditation. Common problems relate to certificates of currency that do not provide the following:

- the retroactive date,
- whether the limit of indemnity is inclusive or exclusive of relevant expenses (expenses of the insured certifier in investigating or defending a claim),
- the number of accredited certifiers in the company / partnership (relevant to the limit of indemnity), and
- information to show the certifier is covered by indemnity insurance for the whole of the period during which he or she has been accredited certifier.

The matters insurance contracts must cover are set out in clauses 9-16 of the Building Professionals Regulation 2007 (BP Regulation) and are summarised in Info sheet 9 *Insurance required by accredited certifiers*, available at www.bpb.nsw.gov.au/p/insurance_9.pdf.

Accredited certifiers are encouraged to advise their insurers / brokers about the requirements for insurance under the BP Act and Regulation and ask them to include all required details on the certificate of currency.

Certifiers are also reminded that it is an offence under the BP Act for an accredited certifier to exercise the functions of a certifying authority unless covered by professional indemnity insurance as required by the BP Regulation. A breach of the Act can also result in a finding of unsatisfactory professional conduct or professional misconduct following a complaint or audit investigation.



Accreditation exam

Applicants who are to be assessed against the requirements of the accreditation scheme, and who have not already registered for the UTS Certification Short Course or do not wish to undertake the short course, will need to undertake the BPB Accreditation Exam.

An Information Sheet on the Accreditation Exam is available at www.bpb.nsw.gov.au.

The remaining offerings of the Accreditation Exam for 2008 (held in Parramatta) are:

- 30 September 2008
- 19 November 2008

Previously, all applicants to be assessed against the accreditation scheme had to successfully complete the short course within 6 months prior to lodging an application. Now, only new applicants for accreditation must successfully complete the short course or pass the exam within 6 months prior to lodging an application. All existing accredited certifiers are able to complete the short course or pass the exam at any time prior to applying to be assessed against the accreditation scheme as long as they have completed their CPD requirements.

Update on CPD

The Australian Institute of Building Surveyors, NSW Chapter (AIBS) recently organised the 2008 Accredited Certifiers: Professional Practice CPD activity focusing on risk management. The activity addressed issues that all accredited certifiers face in conducting certification work from three different perspectives – legal, practitioner's and insurance. Each session generated robust discussion and questioning focusing on the issues that accredited certifiers face every day. Feedback received from these sessions is also being considered in relation to the planning reforms that are currently being finalised.

The BPB would like to thank AIBS for organising the CPD on their behalf.

The 2nd CPD activity for 2008 on Legislative Requirements will be held later in the year. Certifiers will be advised of those arrangements as soon as possible.



The 2008 Accredited Certifiers: Professional Practice CPD team - Bill Burns, AIBS; Steve Watson, Presenter - Practitioner; Jacinta Reid, Presenter - Legal; Daniel Johnson, Presenter - Insurance

NEWS IN BRIEF

Meetings with training/education providers

The BPB recently met with representatives from the Local Government Training Institute (a Division of Hunter Councils Inc - LGTI) and the University of Western Sydney (UWS) to discuss the training needs of building surveyors and fire safety engineers and the qualifications currently being offered.

The LGTI has recently commenced offering a Diploma in Local Government (Environmental Health and Building Assessment) and is in discussions with the BPB to have the course listed in Schedule 3 of the Accreditation Scheme and recognised as meeting all the speciality requirements for an accredited certifier – building surveying grade 3 (A3). The LGTI are tailoring the delivery of the package through assessments and activities to guarantee that graduates meet each of the specialty skill and knowledge criteria for A3. This will streamline the application process for graduates of this course who wish to apply to become an A3 accredited certifier.

At the meeting with UWS, a range of issues were discussed including the future of the building surveying units and the fire engineering qualifications. The BPB continues to work with the UWS with the aim of aligning their courses with the speciality requirements of the accreditation scheme.

As the BPB finalises arrangements with training/education providers for courses to be recognised under the scheme, stakeholders will be notified.

Demolition work

Effective 2 May 2008, demolition work is no longer regulated under the *Home Building Act 1989* in NSW. This means that demolition work is no longer licensed by the Office of Fair Trading.

To undertake demolition work in NSW, however, it is generally necessary to hold a licence and/or permit issued by WorkCover. For more information, refer to the WorkCover website (www.workcover.nsw.gov.au) or call WorkCover on 13 10 50.



Demolition work being carried out recently to make way for a competition winning office building in the Parramatta CBD

Home Building Act review

The *Home Building Act 1989* is currently being re-written by the Office of Fair Trading. Work will continue throughout 2008 and it is anticipated that a leaflet will be prepared for public consultation. Please refer to the Office of Fair Trading website for details (www.fairtrading.nsw.gov.au).

Fair Trading has held consultation meetings with a range of stakeholders including industry, consumer groups, insurers and relevant Government agencies. The aim of these consultations was to gather input on the issues that will need to be addressed as part of the re-write of the Act. Analysis of these issues is now underway and a draft exposure bill will be prepared and released for public consultation in the second half of 2008.

If you would like to be kept informed about the timing of the consultation and how you can have your say on these important reforms, go to the Register to have your say page on the Fair Trading website (www.fairtrading.nsw.gov.au).

Fair Trading expect that changes to the law will be considered by Parliament in 2009.

Expressions of interest – list of qualified trainers

From time-to-time, the BPB is approached by training providers to recommend appropriately qualified accredited certifiers who would be suitable to teach or mark assignments for different courses. While the BPB is unable to recommend individuals, it will establish a list of interested accredited certifiers to supply to training providers.

If you would like your name to be added to this list, please contact the BPB by providing your full contact details and area of expertise – you should also give explicit permission for the BPB to provide this information to training providers on request. Please email your information to bpb@bpb.nsw.gov.au.

Note, your inclusion on this list does not guarantee teaching opportunities and the training provider, not the BPB, will be responsible for ensuring your suitability.

Expressions of interest and nominations for the Board and expert witnesses

The NSW Department of Planning recently sought expressions of interest (EOI) and nominations for membership on the Building Professionals Board. The EOI period has now closed and submissions are being considered. The Department of Planning would like to thank those who have expressed interest; the Board membership will be reported once finalised.

The Building Professionals Board recently also sought expressions of interest for expert witnesses and consultants. The EOI period has now closed and submissions are being considered.

Subscribing to the BPBulletin

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

Contacting the BPB

The Building Professionals Board is located at:

Level 3, Macquarie Tower

10 Valentine Avenue

Parramatta

PO Box 3720, Parramatta NSW 2124

Tel: (02) 9895 5950

Fax: (02) 9895 5949

Important note

This bulletin 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 bulletin.

© Crown Copyright 2008

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 the document.