Ministerial Guidelines

under clause 198 of the EP&A

Regulation 2000

ISSUED SEPTEMBER 2005

Adopted on 21 August 2006.
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Part 1  Introduction

1.1  In 1998 the Building Surveyors and Allied Professions Board Inc (the Board) was authorised by the Minister under s.109S(1)(a) of the Environmental Planning and Assessment Act 1979 (the Act) as an accreditation body. The Board prepared and adopted an accreditation scheme titled “Building Surveyors and Allied Professions Accreditation Board Inc. NSW Accreditation Scheme pursuant to the Environmental Planning and Assessment Act 1979 - December 1998” (the BSAP NSW Scheme) for the purposes of carrying out its functions as an accreditation body.

1.2  On 17 May 2002, the Minister withdrew the authorisation granted to the Board as an accreditation body and appointed the Director-General of the Department of Planning under Clause 199(3) Environmental Planning and Assessment Regulation 2000 (the Regulation) to exercise the authorisation granted to the Board.

1.3  In May 2002 the Minister published Guidelines under Clause 198 of the Regulation to modify the BSAP NSW Scheme and to assist the Director-General to administer the BSAP NSW Scheme. These Guidelines were revised in May 2004.

1.4  The Building Professionals Board (the BPB), a Branch within the Department of Planning, has been established to provide administrative, investigative, auditing and other services for the accreditation appointees.

1.5  The Minister has from time to time made changes to the persons appointed under Clause 199(3) of the Regulation (the accreditation appointees). Currently the accreditation appointees are Ms Jennifer Westacott, Director-General, Department of Planning (appointed 22 October 2003); Ms Alice Spizzo, Executive Director of the Office of the Director-General in the Department of Planning (appointed 29 March 2004); Mr Neil Cocks, Director, Building Professionals Branch within the Department of Planning (appointed 29 December 2004).

1.6  The Minister considers that it now appropriate to revoke the current Guidelines and to adopt new Guidelines.

Part 2  Interpretation

Definitions

In these Guidelines:

Accreditation appointees means Ms Jennifer Westacott, Director-General, Department of Planning; Ms Alice Spizzo, Executive Director of the Office of
the Director-General in the Department of Planning; and Mr Neil Cocks, Director, Building Professionals Board within the Department of Planning.

**Accreditation Scheme** means the BSAP NSW Scheme, as supplemented and modified by these Guidelines.

**Accredited certifier** has the same meaning under the Environmental Planning and Assessment Act 1979 (NSW)

**Act** means the Environmental Planning and Assessment Act 1979 (NSW)

**Board** means the Building Surveyors and Allied Professions Accreditation Board Inc

**BPB** means the Building Professionals Branch within the Department

**BSAP NSW Scheme** means the Building Surveyors and Allied Professions Accreditation Board Inc. NSW Accreditation Scheme pursuant to the Environmental Planning and Assessment Act 1979, December 1998

**Complaint** means a complaint made by a person that an accredited certifier has been guilty of unsatisfactory professional conduct or professional misconduct as defined in s.109R of the Act

**Corresponding law** means:
(a) the Building Act 1975 of Queensland
(b) the Building Act 1993 of Victoria
(c) the Building Act 1993 of the Northern Territory
(d) the Development Act 1993 of South Australia
(e) the Construction Practitioners Registration Act 1998 of the Australian Capital Territory

**Department** means the Department of Planning

**Director** means the Director of the Building Professionals Board

**Director-General** means the Director-General of the Department of Planning

**PCA** means principal certifying authority

**Professional misconduct**, in relation to an accredited certifier, has the same meaning as defined in s.109R of the Act.

**Regulation** means the Environmental Planning and Assessment Regulation 2000 (NSW)

**State Assessment Committee** means the State Assessment Committee established under these Guidelines in Part 5
Unsatisfactory professional conduct in relation to an accredited certifier, has the same meaning as defined in s.109R of the Act.

PART 3 Replacement of guidelines

3.1 The Guidelines published in May 2002 and revised in May 2004 are hereby revoked (the revoked Guidelines).

3.2 These Guidelines dated September 2005 replace the revoked Guidelines and modify and supplement the BSAP NSW Scheme.

3.3 These Guidelines:

(a) Provide advice to the accreditation appointees as to how to carry out the functions in administering the Accreditation Scheme:
(b) Provide for a State Assessment Committee under the Accreditation Scheme.
(c) Provide a process for accrediting certifiers, re-accrediting certifiers and reviewing assessments
(d) Provide for a complaints handling procedure for complaints made under the Act against accredited certifiers
(e) Provide for the process by which an accredited certifier’s accreditation can be suspended or withdrawn.

Transitional Provisions for Complaints

3.4 All complaints lodged with the BPB after the adoption of these Guidelines will be dealt with in accordance with these Guidelines.

Any complaint lodged under the revoked Guidelines is, after the adoption of these Guidelines, to be dealt with by the BPB in accordance with these Guidelines.

Any act taken by the Department or the Complaints Review Committee in the investigation of any complaint under the revoked Guidelines is to be taken to be an act by the BPB in the investigation of a complaint under these Guidelines.

Any information or documents obtained by the Department or the Complaints Review Committee, and any report prepared by the Department or the Complaints Review Committee, in the investigation of a complaint under the revoked Guidelines is to be taken to have obtained or prepared by the BPB in the investigation of a complaint under these Guidelines.

Part 4 Administering the Accreditation Scheme

4.1 As a result of withdrawing the authorisation of the Board as an accreditation body, the Board no longer has power to act as, or perform any functions of, an accreditation body under the Act.
However, the terms of Sections 8.9, and 9 to 17 of the BSAP NSW Scheme, relating to the accreditation, re-accreditation and complaint investigation of accredited certifiers, continue to apply.

In the event of any inconsistency between the BSAP NSW Scheme and these Guidelines, these Guidelines will prevail.

4.2 Any reference to the Board in the BSAP NSW Scheme will be taken to be a reference to the accreditation appointees. Any reference to the State Assessment Committee in the BSAP NSW Scheme will be taken to be a reference to the State Assessment Committee established under these Guidelines in Part 5.

4.3 The accreditation appointees may make arrangements between themselves for the performance of any function under the Accreditation Scheme that has not been allocated by these Guidelines. Notwithstanding any such arrangement, or any provision within these Guidelines assigning a function to the Director, the Director-General may determine at any time to reserve to herself, or to re-allocate to another accreditation appointee, any function under the Accreditation Scheme that has not been allocated by these Guidelines or which has been allocated by these Guidelines to the Director.

Part 5  State Assessment Committee

5.1 The State Assessment Committee is hereby established for the purposes of the Accreditation Scheme. The members of the State Assessment Committee will be appointed by the Director. The State Assessment Committee shall report to the Director or other accreditation appointee as required.

Composition

5.2 The State Assessment Committee will consist of the following members:
- at least one employee of the Department
- at least one local government officer with expertise in development and building assessment in NSW, as nominated by the Local Government and Shires Associations
- at least one building surveyor employed in NSW, as nominated by the Australian Institute of Building Surveyors
- at least one representative of the Development and Environmental Professionals Association (formerly Environmental Health and Building Surveyors Association of New South Wales) with expertise in building surveying
- at least two university representatives with expertise in building issues.
- such other persons that the Director considers have suitable experience or qualifications to carry out the functions required of a member of the State Assessment Committee
5.3 Where the State Assessment Committee is of the view that specialist expertise is required to assist it in the carrying out of its functions, the State Assessment Committee can, with the approval of the Director, seek advice and assistance from appropriately qualified persons.

5.4 The Director shall appoint a Departmental member as the permanent Chair of the State Assessment Committee. The Director may appoint another Departmental member to preside as the Chair at any meeting of the State Assessment Committee where it is impractical for the permanent Chair to attend or preside. The Director may at any time revoke the appointment of a Departmental member to the position of permanent Chair and appoint another Departmental member to the position.

5.5 Unless otherwise vacated, membership of the Committee will continue for a period of one year. Thereafter, the members will annually be considered for re-appointment.

5.6 The office of a member of the Committee is vacated if:
(a) the member dies or becomes incapacitated
(b) the member resigns in writing addressed to the Director
(c) the member is removed by the Director under Part 5.12
(d) the Committee ceases to function.

Conflicts of interest

5.7 Where a member has any material, pecuniary or other interest that would lead to a reasonable apprehension that the member may be biased in the conduct of their role, the member:
(a) must disclose the facts and circumstances to the Director as soon as possible, and
(b) must not participate in the consideration or investigation of a matter unless the Director is satisfied that in the circumstances it is appropriate that the member should continue in the role.

Functions

5.8 The State Assessment Committee will carry out the following functions:
(a) make recommendations to the Director about applications by persons seeking to become accredited certifiers
(b) consider complaints against accredited certifiers and make recommendations to the Director in relation to appropriate disciplinary action
(c) provide advice to the Director on the operation of the Accreditation Scheme.
(d) make recommendations to the Director concerning the suspension or withdrawal of the accreditation of an accredited certifier.
Meetings

5.9 The State Assessment Committee will meet a minimum of twelve (12) times per year, and convene additional meetings as required, to consider applications for accreditation and re-accreditations and complaint investigations.

Quorum

5.10 A State Assessment Committee meeting cannot commence unless a quorum is present. A quorum will exist where at least the following are in attendance:
(a) the Chair
(b) one Local Government member
(c) one Australian Institute of Building Surveyor member

Conduct and Removal of State Assessment Committee members

5.11 In carrying out their functions, State Assessment Committee members are expected to comply with the requirements of the Conduct Guidelines for Members of NSW Government Boards and Committees. (Nov. 2001 ed.).

5.12 The Director may remove a member from the State Assessment Committee for any reason by giving notice in writing to the member and the State Assessment Committee. The decision of the Director shall be final.

Part 6 Accreditation of certifiers

6.1 Applications for accreditation must be lodged with the BPB and be made in accordance with Section 15 of the Accreditation Scheme and include the relevant fee.

Part 7 Re-accreditation of certifiers

Procedure for application for re-accreditation

7.1 Applications for re-accreditation must be lodged with the BPB and be made in the form as determined by the Director and published on the website of the Department (www.dipnr.nsw.gov.au) and the BPB (www.bpb.nsw.gov.au)

Each application must contain:
• the information set out in Section 15.1 of the Accreditation Scheme
• the information set out in Section 15.6 of the Accreditation Scheme
• evidence of the CPD points accumulated during the current year of accreditation, and
• the relevant fee.

7.2 Applications for re-accreditation must be received by the BPB no later than two months before the expiry date of the accredited certifier’s accreditation.

Criteria for re-accreditation

7.3 Persons applying to be re-accredited under the Accreditation Scheme must possess the qualifications and have the necessary experience identified in Section 11 of the Accreditation Scheme or demonstrate that they possess the competencies set out in Section 12 of the Accreditation Scheme.

7.4 The State Assessment Committee may recommend to the Director that the level of accreditation granted to an accredited certifier be amended. To make such a recommendation, the State Assessment Committee must be satisfied that the certifier holds the qualifications and experience for the amended level of accreditation set out in Sections 11 and 12 of the Accreditation Scheme.

Review of determination

7.5 Applicants who are dissatisfied with the result of their application for re-accreditation may seek a review of the assessment. The applicant must request a review within one month of the date of notification of the result of their application and state the grounds for their request. The State Assessment Committee will interview the applicant and consider any new information presented and make recommendations to the Director. The applicant will be advised within 5 working days of the Director’s decision.

Part 8 Application fees

8.1 Fees for application for accreditation and re-accreditation of accredited certifiers will be as determined by the Director-General from time to time and published on the website of the Department (www.dipnr.nsw.gov.au) and the BPB (www.bpb.nsw.gov.au).

Part 9 Complaints

Investigating complaints

9.1 All complaints received by the BPB on behalf of the accreditation appointees will be investigated by the BPB.
9.2 Each complaint will be the subject of an investigation report by the BPB. The report will be referred to the State Assessment Committee for consideration.

9.3 Any complaints received by the Board that had not been finalised before 17 May 2002 will be reviewed and re-investigated as necessary by the BPB as soon as practicable.

**Process for investigation**

9.4 After receiving a complaint, the BPB will, within 14 days in writing, inform:
- the accredited certifier nominated in the complaint of the nature of the complaint, and
- the complainant that the complaint has been received.

9.5 Each complaint will be investigated as follows. The BPB:
(a) will review the information in the complaint for completeness and accuracy
(b) may require the complainant to provide further information about the complaint or verify further particulars as required
(c) will invite the certifier to make representations, verified by statutory declaration, about the complaint within 28 days to the accreditation body
(d) may require the accredited certifier to otherwise assist in, or cooperate with the investigation of the complaint
(e) may seek any further information, verified by statutory declaration, from the complainant or any other person, including an inspection of the development or a review of documentation held by the relevant council in relation to the complaint
(f) will provide a written complaint investigation report to the State Assessment Committee setting out the information obtained during the investigation, together with recommendations as to the findings that the State Assessment Committee may make based upon the information and whether such information may support a finding by the State Assessment Committee that the accredited certifier has been guilty of unsatisfactory professional conduct or professional misconduct.

9.6 Where further information is not provided by the complainant or accredited certifier as requested, the BPB will report on the basis of the evidence presented and collected.

9.7 Before consideration of the complaint by the State Assessment Committee the BPB will invite the accredited certifier and the complainant to make written representations on the contents of the complaint investigation report (referred to in 9.5(f)), a copy of which is to be provided with the invitation. The offer to make representations must be made at least 28 days before the meeting.
9.8 After considering the BPB’s complaint investigation report and any written representations received, the State Assessment Committee may determine to:
- require the BPB to carry out further investigations into specific matters, and to provide a report into the results of the investigations,
- require the BPB to provide further documents or information,
- request the accredited certifier to provide further information or documents, and to verify the information or documents by statutory declaration
- invite the accredited certifier or the complainant to attend a future meeting of the State Assessment Committee for the purpose of providing further information orally. In the event of the complainant being invited to attend a committee meeting, the accredited certifier must also be invited to attend. Any invitation to attend must be made at least 28 days before that future meeting.

The accredited certifier must be provided with a copy of any report, document or information in written form received from the BPB or the complainant pursuant to this clause and be provided with at least 28 days to make further written representations in respect thereto.

9.9 The State Assessment Committee will consider the BPB’s complaint investigation report, written representations received in relation this report, any report, document, information or representation obtained under clause 9.8, and any verbal information or representations received at its meetings.

9.10 Where it considers appropriate, the State Assessment Committee may also carry out a site inspection.

Double Jeopardy

9.11 In the event of the State Assessment Committee becoming aware that the same item of complaint relating to the same development and the same accredited certifier:
- has been the subject of an earlier determination of the Director under s.109Z or the Administrative Decisions Tribunal under s.109ZA, the State Assessment Committee shall report this to the Director and recommend that the complaint be dismissed under s.109Z(5).
- is the subject of another investigation into a complaint made by a different complainant or is the subject of report prepared as the result of an investigation conducted under s.118Q, the State Assessment Committee shall report this to the Director and recommend that the investigations be merged into a single investigation.

Reporting to the Director

9.12 Following its meeting to consider the information obtained in relation to a complaint, the State Assessment Committee will report to the Director. The report will be in writing and include:
- the relevant details of the complaint
- the complaint investigation report
• significant points of any written or verbal information or representations received
• the State Assessment Committee’s recommendation(s)
• the reasons for the recommendation(s).

Criteria against which decisions are made

9.13 Except as provided for in paragraph 9.14, the State Assessment Committee must recommend that the Director institute proceedings in the Administrative Decisions Tribunal if satisfied there is a reasonable likelihood that the accredited certifier will be found guilty of unsatisfactory professional conduct or professional misconduct.

9.14 The State Assessment Committee may recommend that the Director:

• take one or more of the actions set out in s 109Z(4)(a), subject to the accredited certifier consenting, or
• dismiss the complaint if satisfied that the accredited certifier is generally competent and diligent and no other material complaints have been made against the accredited certifier.

where it is satisfied that there is a reasonable likelihood that the accredited certifier will be found guilty by the Administrative Decisions Tribunal of unsatisfactory professional conduct, but not professional misconduct.

9.14 The State Assessment Committee may recommend that the Director dismiss the complaint where it is satisfied that there is no reasonable likelihood that the accredited certifier would be found guilty by the Administrative Decisions Tribunal of unsatisfactory professional conduct or professional misconduct.

9.15 The State Assessment Committee may also recommend that where an accredited certifier the subject of a complaint is no longer accredited, that the investigation of the complaint against that accredited certifier be terminated in accordance with s109ZF(3) of the Act..

Part 10 Powers of the Director on Complaints

10.1 The powers of the Director in determining the action to be taken in respect to complaints are those expressed in section 109Z of the Act. In determining what action, if any, to take, the Director shall have regard to, but is not bound by, the report and recommendation(s) of the State Assessment Committee.

Part 11 Suspension of accredited certifiers

11.1 The State Assessment Committee may make a recommendation to the Director that an accredited certifier’s accreditation be suspended or
withdrawn under s.109T of the Act. For the purpose of making such a recommendation the State Assessment Committee may have regard to all information available to the BPB or the Department, whether obtained through the investigation of a complaint, the conduct of an audit or by other means.

11.2 The Director may, whether or not the State Assessment Committee has made a recommendation under 12.1, by notice in writing served on the accredited certifier in accordance with s.153 of the Act, suspend or withdraw the accreditation of an accredited certifier if satisfied that the grounds for such action, as set out in s.109T of the Act and Clause 204 of the Regulation, exist.

11.3 Before determining whether to suspend or withdraw an accredited certifier’s accreditation, the Director must give the accredited certifier a period of not less than seven days to make representations as to any reasons why the Director should not suspend or withdraw the accreditation.

The Director is not required to provide the accredited certifier with an opportunity to make representations if:

- after making reasonable efforts to do so, the Director is not able to contact the accredited certifier promptly to advise of that opportunity, or
- the Director is of the opinion that there is an immediate risk to the safety of any person or serious damage to any property arising from the continued accreditation of the accredited certifier.

The Director must have regard to any representations received from the accredited certifier before determining whether to suspend or withdraw the accreditation.

Part 12    Replacing the Principal Certifying Authority (PCA)

12.1 The Director may approve of the replacement of a PCA with another PCA as provided for in section 109EA of the Act and clauses 16.1 and 16.7 of the Accreditation Scheme.

12.2 The “special circumstances” under clause 16.7 of the Accreditation Scheme for consideration of replacement of the PCA include, but are not restricted to, circumstances where:

(a) the PCA dies,
(b) the PCA is found to be suffering from mental illness,
(c) the PCA becomes incapacitated,
(d) the PCA ceases to practice as a PCA,
(e) the PCA changes employer and cannot continue as PCA,
(f) the PCA has his entitlement revoked eg. Downgrading,
(g) the PCA is no longer an accredited certifier within the meaning of the Act,
(h) the PCA becomes bankrupt,
(i) the PCA is declared not a fit and proper person,
(j) a conflict of interest within the meaning of section 109ZG of the Act occurs,
(k) the PCA is found guilty by the Administrative Decisions Tribunal of unsatisfactory professional conduct or professional misconduct,
(l) the PCA does not hold the level of accreditation under the accreditation scheme to carry out the necessary work,
(m) the PCA cannot discharge his/her responsibilities as a PCA
(n) the Director is otherwise satisfied it is appropriate to do so.

12.3 A person wishing to replace a PCA must apply in writing on the form provided by the BPB, providing evidence of the appointment of the original PCA and stating the reasons for the request. The application must be based on fact, must refer to any negligence, incompetence, and or breach of the Code of Professional Conduct by the certifying authority, and must indicate events, times, dates and nature of alleged behaviour.

12.4 Fees for application for replacing the PCA will be as determined by the Director-General from time to time and published on the website of the Department (www.dipnr.nsw.gov.au) and the BPB (www.bpb.nsw.gov.au).

Minister Sartor,

Dated September 2005