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## COMMENCEMENT OF THE *BUILDING PROFESSIONALS ACT 2005*

### The BPB is pleased to announce that the BP Act will be commenced in two stages.

The **first stage** will commence the provisions which allow the Board to be appointed and to meet together for the first time.

At the **second stage**, the balance of the BP Act will commence, which will allow the Board to commence accrediting applicants as accredited certifiers, hearing complaints against accredited certifiers and carrying out audit investigations into the work and activities of all certifying authorities. It is anticipated that these provisions will commence in early 2007. Until that time, the existing accreditation bodies will continue to accept applications for accreditation and investigate complaints made against those they accredit.

### Building Professionals Regulation 2006 and Accreditation Scheme update

The BPB is also pleased to announce that the BP Regulation and Accreditation Scheme for Accredited Certifiers are anticipated to be gazetted shortly. However, they will not take effect until the BP Act is fully proclaimed. Like the Act, the new requirements in the Regulation and Scheme are expected to commence on 1 March 2007.

### Letters to accredited certifiers and councils

The BPB will write to all accreditation bodies, existing accredited certifiers and councils in NSW to inform them of the final commencement dates for the Act, Regulation and Scheme and of the effect of the transitional provisions in the Act and Regulation. A copy of the letter will be available at [www.bpb.nsw.gov.au](http://www.bpb.nsw.gov.au).



# RECENT CHANGES AFFECTING CERTIFIERS AND COUNCILS

## Review of Swimming Pools Act 1992

Accredited certifiers may be aware that the Department of Local Government is in the process of conducting a review of the *Swimming Pools Act 1992*. The Department has now released a discussion paper based on the submissions it received during the first round of consultations.

The discussion paper details the major issues identified to date and provides the basis for inviting further comment on possible changes to the legislation. These include:

- *Risk groups and statistics* – What are the main reasons for changes in the rates of drowning of small children in private swimming pools and what factors are effective in improving pool safety?
- *Coverage of the legislation* – Should the exemptions that currently apply to waterfront, large and small properties, and pools constructed before 1 August 1990, continue to apply?
- *Standards* – Should the standards applying to doors and windows that form part of a barrier be changed? How should dividing fences that form part of a barrier be treated?
- *Council responsibilities* – Should councils collect a mandatory set of information as part of their pool register? Should council inspections be compulsory? If so, how should the cost of these inspections be funded? Is the current maximum penalty under the Act adequate?

Copies of the discussion paper, the Act and the Swimming Pools Regulation are available at [www.dlg.nsw.gov.au](http://www.dlg.nsw.gov.au). Councils and accredited certifiers are encouraged to make submissions **by 19 January 2007**.

## Environmental Planning and Assessment Act amendments

On 4 December 2006, the *Environmental Planning Legislation Amendment Act 2006* received assent.

### *Issue of Part 4A certificates*

Of particular relevance to accredited certifiers and councils are amendments brought about by the Amendment Act to the *Environmental Planning and Assessment Act 1979* (EP&A Act), the *Strata Schemes (Freehold Development) Act 1973* and the *Strata Schemes (Leasehold Development) Act 1986* (the Strata Acts) concerning the requirements for the issue of Part 4A and strata certificates.

Currently, Part 4A certificates and strata certificates can only be issued if a certifying authority is “satisfied” as to certain specified requirements. The Land and Environment Court has held that the reference to “satisfied” only requires a certifying authority to be satisfied on a subjective basis (*Warringah Council V Moy* [2005] NSWLEC 416).

The Amendment Act amends Part 4A of the EP&A Act and the Strata Acts to remove the “satisfied” test for the issue of Part 4A and strata certificates. As a result, certifying authorities will need to ensure that the matters set out in sections 109F, 109G, 109H and 109J and the Strata Acts have occurred before issuing the relevant Part 4A or strata certificate.

These provisions in the Amendment Act will not commence until amendments are made to the Environmental Planning and Assessment Regulation 2000 (EP&A Regulation) which will make similar changes to clauses 145 and 146 as to the matters that must occur prior to the issue of a construction certificate.

### *Council appointments as the PCA*

The Amendment Act also inserts into the EP&A Act a provision that makes it clear that councils must accept appointments as the principal certifying authority (PCA), either as a first appointed PCA or as a replacement PCA.

A fact sheet, which provides a brief overview of the changes, will be published soon at [www.planning.nsw.gov.au](http://www.planning.nsw.gov.au). Councils and other stakeholders will be advised by circular as parts of the Act commence.

To view a copy of the Amendment Act, go to [www.parliament.nsw.gov.au](http://www.parliament.nsw.gov.au).

## Smoke alarms

To enhance safety and minimise loss of life in building fires, the NSW Parliament in July last year, enacted the *Building Legislation Amendment (Smoke Alarms) Act 2005*. The Act allows regulations to be made to require smoke alarms to be installed in existing buildings in which people sleep. Smoke alarms are already mandatory for all new buildings and in some instances when buildings are altered or their use changed.

**From 1 November 2006**, all owners must have smoke alarms installed in properties where people sleep to comply with the Environmental Planning and Assessment Amendment (Smoke Alarms) Regulation 2006, which took effect on 1 May 2006. The Regulation outlines the types of buildings that require alarms, the type of alarms required and where the alarms are to be located.



Smoke alarms for private dwellings must comply with Australian Standard AS 3786 1993, Smoke Alarms.

AS 3786 contains design and performance criteria for self-contained smoke alarms, including acceptable power sources.

# FOCUS ON THE BPB – EDUCATION AND TRAINING

The BPB has three core functions – accrediting individuals as accredited certifiers, investigating complaints made about accredited certifiers and conducting investigations (audits) into the work and activities of certifying authorities (accredited certifiers and councils). Supporting these functions is the Policy Unit, one focus of which is education. In this article, the education role of the BPB is explained.

## The role of education and training

In recognition of the importance of education about the certification system, the Policy Unit includes a Senior Education Officer whose role is to ensure that the current and future educational/training needs of certifiers, councils and consumers are met.

## Certifier training

Over the past 12 months, the BPB has been working with professional associations, training providers and other stakeholders to finalise the BPB accreditation scheme. When the scheme commences, applicants will have access to a range of materials which will assist them in understanding the role of the accredited certifier and the requirements to become an accredited certifier, as well as application guides and information about ongoing professional development obligations.

Under the BPB Accreditation Scheme, applicants will be required to provide evidence that they have a range of core knowledge and skills, as well as specialty knowledge and skills depending on their areas of specialisation. One of the ways to demonstrate the core knowledge and skills under the scheme will be to undertake a short course on certification. The BPB has been working with the University of Technology, Sydney on a new 4 day short course to satisfy this requirement – it is anticipated that the course will be first offered in late March 2007 (details of course offerings will be available at [www.clg.uts.edu.au](http://www.clg.uts.edu.au)).

As an ongoing requirement of accreditation, certifiers must also undertake continuing professional development (CPD) as required by the Accreditation Scheme. The BPB has had preliminary discussions with training providers in relation to the CPD requirements. The BPB anticipates announcing CPD offerings in early 2007.

Other priorities for the BPB include identifying and/or creating clear career pathways for people wanting to become accredited certifiers. This will include reviewing the courses currently available and, wherever possible, embedding the experience requirements to be an accredited certifier as required by the Scheme within courses so that graduates will be eligible for accreditation on graduation.

Seamless transfer between states is also a current problem for accredited certifiers wanting to work in other jurisdictions. In concert with our colleagues in other states, the BPB is working towards achieving full and effective mutual recognition of the Council of Australian Governments (COAG) agreement in February 2006 (see [www.coag.gov.au](http://www.coag.gov.au)).

## Consumer education

Another important facet of the education role is consumer education. Anecdotal evidence indicates that consumers are often uninformed or misinformed about the role and responsibilities of an accredited certifier and the role of the local council authority. Additional consumer information is being developed for the BPB website and in brochures to be disseminated via a variety of means (e.g. councils, accredited certifiers) to improve awareness of the certification process. The BPB is also striving to ensure its website contains relevant, up-to-date and useful advice on the system.

## Staff training

BPB staff bring a wealth of knowledge and experience to their positions. To ensure that they maintain currency of that knowledge, all staff at the BPB participate in ongoing training in their area of expertise and general work protocols. Training is conducted either in-house or externally by appropriate providers.

# RECENT DISCIPLINARY FINDINGS

## Disciplinary proceedings in the Administrative Decisions Tribunal (ADT)

In March 2006, the Department commenced disciplinary proceedings in the ADT against George Cousins, a Grade 3 accredited certifier under the Building Surveyors and Allied Professions (BSAP) Accreditation Scheme, in respect of three complaints lodged by the Greater Taree City Council and the Great Lakes Council.

In the proceedings before the Tribunal, it was alleged that Mr Cousins had:

1. Issued a construction certificate in respect of plans for the construction of a dwelling on a rural property with a set back of 10.5 metres, which was inconsistent with a condition of development consent that required a set back of at least 20 metres.

The error was detected by the builder when the building was at floor level. When discussions with the council indicated that a section 96 modification under the EP&A Act would be unlikely to have the support of the NSW Rural Fire Service, the builder demolished the work and recommenced construction in accordance with the approved set back requirement.

2. Failed to detect at the first inspection that a dwelling under construction was two metres forward of the set back as depicted on the construction certificate drawings, and had also failed to detect that the floors were constructed approximately 600mm too high.

The owner was required to make an application to the council under the EP&A Act to allow the work as built to remain.

3. Issued two construction certificates for an indoor cricket centre that did not comply with the travel distance requirements of the Building Code of Australia (BCA) in respect of evacuation in the event of a fire.

The Tribunal was not required by the parties to make a determination in relation to whether the allegations were proven and on 27 November 2006 the Tribunal made orders by consent under section 86 of the *Administrative Decisions Tribunal Act 1997*. Mr Cousins advised that he had sold his business and did not intend to undertake any further work as a certifier. Mr Cousins gave an undertaking to the Tribunal to surrender his accreditation by 23 December 2006. On the basis of that undertaking, the Tribunal found Mr Cousins guilty of unsatisfactory professional conduct under the EP&A Act and made the following orders:

1. That Mr Cousins be reprimanded
2. That Mr Cousins pay a fine of \$5000 by 30 March 2007
3. That a condition be imposed on Mr Cousins' accreditation preventing him from entering into any new contracts or arrangements to provide certifying services or from accepting any new appointments as a PCA. This condition is to apply until Mr Cousins' accreditation expires or is voluntarily withdrawn.

## Department disciplinary decisions

Examples of complaints recently determined by the Department under the EP&A Act with respect to accredited certifiers under the BSAP accreditation scheme include:

### Issue of complying development certificate (CDC) that did not satisfy council's criteria

**Allegation:** That the accredited certifier determined a CDC that did not comply with the council's complying development control plan.

**Details:** The accredited certifier approved a CDC for a swimming pool that did not comply with council's Complying Development - Development Standards as the swimming pool was located within the building line and over or within the zone of influence of a sewer main.

**Decision:** The Department considered that the accredited certifier's actions fell short of the standard of diligence and integrity that a member of the public is entitled to expect of a reasonably competent accredited certifier and determined that there was a reasonable likelihood the accredited certifier would be found guilty by the ADT of unsatisfactory professional conduct (but not professional misconduct). In the circumstances, the Department issued a reprimand to the accredited certifier pursuant to section 109Z(4) of the EP&A Act.

## Building works not in accordance with construction certificate plans and BCA

**Allegation:** That the accredited certifier approved the construction of hot air exhaust ducting not shown on the construction certificate plans and there was inadequate sound attenuation and noise insulation to mechanical services rooms.

**Details:** The exhaust duct was not indicated on the construction certificate plans. It was within the discretion of the PCA to accept these works as the ducting is a requirement of the gas authority. The works complied with the deemed-to-satisfy provisions of the BCA, and the accredited certifier resolved the issue satisfactorily.

**Decision:** The Department dismissed the complaint against the accredited certifier pursuant to section 109Z(5) of the EP&A Act as there was no reasonable likelihood the accredited certifier would be found guilty by the ADT of either unsatisfactory professional conduct or professional misconduct.

## Issue of occupation certificate in contravention of the development consent

**Allegation:** That the accredited certifier issued an occupation certificate for building works that were incomplete and not in accordance with the development consent, as a result of which the complainant purchased a building that contained substantial and/or significant defects.

**Details:** An occupation certificate with what appeared to be the signature of the accredited certifier was obtained by the developer. The accredited certifier asserted at all times that he was not responsible or could not be held accountable for issuing the occupation certificate in question as he had not signed the certificate. The accredited certifier also asserted that he had not conducted or carried out a final inspection of the development.

The Department sought additional evidence to support the accredited certifier's claims. In response, the accredited certifier submitted a letter from a colleague that appeared to suggest that the developer may have coerced clerical staff within the company to print an occupation certificate. The accredited certifier filed a statement with his local police station and submitted a statutory declaration to support his claims that he had not issued the occupation certificate. The Department accepted the submitted statements and concluded that the occupation certificate in question was either fraudulently obtained or was a forged document.

**Decision:** The Department dismissed the complaint on the basis that it could not be reasonably satisfied that the accredited certifier signed and issued the relevant occupation certificate, and there was no reasonable likelihood the accredited certifier would be found guilty of unsatisfactory professional conduct or professional misconduct by the ADT.

## Conflict of interests

**Allegation:** That the accredited certifier breached the conflict of interests provisions in the EP&A Act in that he acted as a certifying authority for a development where his employer:

- i) was the applicant for the development application lodged with the local council for the proposed works; and
- ii) paid the development application fees to the council

**Details:** The Department found that the certifier was not employed by the company that applied for the development application and paid the application fees, and that the certifier had no involvement in the preparation or submission of the development application.

**Decision:** The Department determined that there was no reasonable likelihood that the certifier would be found guilty of unsatisfactory professional conduct or professional misconduct by the ADT and the complaint was dismissed in accordance with section 109Z (5) of the EP&A Act.

## Certification of a development not in accordance with the approved development consent plans and form of notices

**Allegation 1:** That the accredited certifier certified building works that were not in accordance with the approved development consent plans.

**Details:** The complaint concerned the demolition of an existing dwelling and construction of a new two storey dwelling. Alleged non-compliances included changes to external window configurations, ceiling height increases, first floor slab thickness increases, concrete slab roof in lieu of metal roof, and external roof parapets raised by 300mm.

Building work had been undertaken that was not in accordance with the development consent and construction certificate plans. The unauthorised works had not been approved by the certifier. At the relevant time, critical stage inspections were not mandatory under the EP&A Act. The accredited certifier had not issued an occupation certificate for the development.

**Decision:** On the basis that there was no evidence to demonstrate the accredited certifier permitted or issued a Part 4A certificate in relation to the unauthorised building works, the Department determined that there was no reasonable likelihood that the accredited certifier would be found guilty of unsatisfactory professional conduct or professional misconduct by the ADT and the complaint allegation was dismissed.

**Allegation 2:** That the accredited certifier produced a Notice of Commencement of Building Works form and an Appointment of Principal Certifying Authority form that were not strictly in accordance with the requirements prescribed within clauses 103 and 104 of the EP&A Regulation.

**Details:** The notice of appointment of the PCA form did not include the name and address of the person by whom the notice was given, the name of the accreditation body by which the accredited certifier was accredited, nor a statement signed by the accredited certifier to the effect that the certifier consented to being appointed as the PCA.

**Decision:** The Department determined that there was a reasonable likelihood that the accredited certifier would be found guilty of unsatisfactory professional conduct by the ADT. The accredited certifier was ordered to report on his practice in relation to the procedures implemented to ensure compliance with the EP&A Act and EP&A Regulation in the future.



A PCA must be satisfied that in issuing an interim occupation certificate the building will not constitute a hazard to the health or safety of the occupants.

## Complaints against accredited certifiers: how many is too many?

In Issue Six, an analysis of the complaints determined by the BPB in 2005 against accredited certifiers under the BSAP Accreditation Scheme was provided.

How many complaints should reasonably be expected in relation to certification matters in any year and what percentage of those would reasonably be expected to result in findings of unsatisfactory professional conduct?

### *The number of complaints*

There are approximately 450 accredited certifiers in NSW. Those certifiers issued approximately 35,000 certificates for thousands of developments involving building and subdivision in 2005, comprising between 25% and 30% of all construction, occupation, complying development, subdivision and strata certificates issued (these figures do not include compliance certificates).

A total of 64 complaints were received in 2005 by the accreditation bodies responsible for those 450 accredited certifiers. Of the 103 complaints determined by accreditation bodies in 2005, approximately 55% (57 complaints) resulted in findings of unsatisfactory professional conduct.

This represents one complaint received per 547 certificates issued, that is less than 0.2 of one per cent of all certificates issued resulted in a complaint being made.

By any measure this would appear a small number of complaints.

### *Complaints received by each accreditation body*

Of the 64 complaints received by all accreditation bodies in 2005, 56 complaints were received by the Department of Planning against the 200 certifiers accredited under the BSAP accreditation scheme. Approximately 250 other certifiers are accredited by Engineers Australia (229 certifiers), the Professional Surveyors' Occupational Association (9 certifiers), and the Planning Institute of Australia (8 certifiers) under their respective accreditation schemes. In 2005, a combined total of 8 complaints were received against accredited certifiers under those three schemes. Why the disparity in complaints received?

### *Factor – the type of certification*

The number of complaints received is clearly linked to the type of certification undertaken by accredited certifiers. The majority of construction, complying development and occupation certificates issued by accredited certifiers in NSW are issued by certifiers under the BSAP scheme and the function of issuing those certificates is more contentious than other functions, leading to more complaints.

The Department receives very few, if any, complaints about BSAP certifiers regarding the issue of compliance certificates, however the majority of certifiers accredited under the Engineers Australia scheme are accredited to issue **only** compliance certificates. Only 16 certifiers are accredited by Engineers Australia to issue construction, complying development and occupation certificates.

In addition, the majority of complaints received by the BPB relate to readily observable matters, which are generally apparent through reviewing plans and approvals and checking them against what is occurring 'on the ground'. Councils and neighbours are in a good position to identify these matters. Neighbours, in particular, many of whom have been heavily involved in the development consent process, keenly observe development sites and are sufficiently astute to identify variations from the development consent.

On the other hand, compliance certificates often relate to elements of construction that are not readily observable and, if they are, they may be technical in nature, beyond the understanding of a lay person or of little consequence to a neighbour's "amenity". As a result, it is not surprising that few complaints are received about certifiers who specialise in the issue of compliance certificates.

### *Factor – the number of formal complaints*

The total number of complaints received is also impacted upon by the “filtering” process which occurs at the point of the initial enquiry to the accreditation body from a potential complainant. Persons who contact the BPB often do not proceed with a formal complaint once they are advised of the role and responsibilities of the accredited certifier in the certification process and the relevance of the person’s concerns to those responsibilities.

This “filtering” means that a significant proportion of the formal complaints that are received are in a form and of a type which are more likely to result in a finding of unsatisfactory professional conduct. As a result, a relatively high proportion of findings of unsatisfactory professional conduct arising from the complaints investigated is not necessarily an indicator of overall poor industry performance.

### *Factor – the certifying authority*

The number of complaints received is also to some degree a function of the concerns neighbours may have about the relationship between the accredited certifier and the developer/land owner. The fact that the land owner directly appoints the accredited certifier and that the certifier is directly paid by the land owner may foster a level of distrust by neighbours about the potential compliance of a development with the development approval. The same distrust does not appear to exist when a council is the certifying authority. Neighbours are more likely to consider that non-compliance of a development that is certified by a council results from the council’s workload, lack of appropriately skilled staff or limited resources rather than any inducement by the land owner to the council staff to ignore variations from the development consent.

### *Number of complaints as a performance measure*

The number of complaints against accredited certifiers cannot and should not be used as the sole indicator of the performance of the accreditation and/or certification system. As mentioned previously, many matters which are not readily observable but which are nonetheless critical to the “quality” of certification undertaken, will not come to the attention of the Department via a complaint. Other performance measures, such as the level of compliance of certificates issued under the EP&A Act with relevant legislative requirements and the level of compliance of completed buildings with relevant legislative requirements, are needed for this purpose. These indicators however require significant resources to measure.

Nonetheless, a reduction in the number of complaints, as well as in findings of unsatisfactory professional conduct/professional misconduct against accredited certifiers, over time as a percentage of persons accredited/certificates issued must remain goals for the new Building Professionals Board.

# PRACTICE ADVICE AND REMINDERS

## Swimming pool and spa pool certification

This article is intended to draw attention to the existing legislative requirements for swimming pools and spa pools, particularly those contained in the BCA.

It appears to be common practice for certifying authorities, when issuing construction certificates or conducting inspections of swimming pools or spas, to focus on the requirements of the *Swimming Pools Act 1992* and the Swimming Pools Regulation 1998, that is, fencing and safety signage.

The EP&A Act, however, also requires pools and spas in NSW to comply with the BCA. In turn, the BCA, via NSW variations, requires compliance with Australian Standard 1926 *Swimming Pool Safety: Part 3 Water recirculation systems*. The NSW variations and AS 1926.3 make requirements for the safe operation of, among other things, outlet systems and provide an example of how to comply.

In NSW, the legislative requirements applicable to swimming pools and spas are listed below and are matters that should be considered when determining an application for a construction, complying development or occupation certificate:

**Swimming Pools Act 1992** – addresses the restriction of access to swimming pools (i.e. fencing) and signage.

Exemptions to barrier requirements may only occur following an application by the owner of the premises on which the swimming pool is situated to the local authority in accordance with section 22. The consent authority may only grant an exemption provided the barrier is impracticable or unreasonable (because of the physical nature of the premises, the design or construction of the swimming pool, or special circumstances of a kind recognised by the Regulation as justifying the granting of an exemption) for the swimming pool to comply with those requirements or that alternative provision, no less effective than those requirements, exists for restricting access to the swimming pool.

An exemption may be granted unconditionally or subject to such conditions as the local authority considers appropriate to ensure that effective provision is made for restricting access to the swimming pool concerned or the water contained in it.

**BCA National Provisions** – regulate structural adequacy and the drainage of swimming pools. The BCA also regulates access to swimming pools (fencing), however these provisions do not apply in NSW where access is regulated under the Swimming Pools Act (as indicated above). Note: the BCA definition of ‘swimming pool’ includes a spa.

**BCA NSW Appendices** – since July 2002, NSW has dealt with the risk of entrapment or injury of young children in a swimming pool relative to water recirculation and filtration systems through NSW additions to each volume of the BCA, namely Volume One: NSW Appendix, Part G1 Minor Structures and Components, and Volume Two: NSW Additions, NSW 1 – Water Recirculation and Filtration Systems.

The NSW Variations add provisions which:

- state that swimming pools must provide means to minimise the risk of entrapment or injury of young children using the pool,
- state that water recirculation and filtration systems must incorporate safety features to avoid entrapment of or injury to a young child, and
- incorporate a deemed-to-satisfy provision for water recirculation and filtration systems to comply with the relevant Australian Standard – AS 1926.

**AS 1926.3** – sets out requirements for skimmer boxes and outlets in swimming pools:

- The installation of skimmer boxes is regulated through dimension requirements and, in specified situations, requirements for separation from the pool edge. Lids on skimmer boxes must be vented.
- The installation of outlets is required so that each pump system has a means of releasing the vacuum pressure of an outlet if it becomes blocked.

An example of a complying design, given in the Australian Standard, is a system in which, among other things, each pump is connected to at least two outlets from the pool.

The accredited certifier will monitor compliance with the above requirements during progress inspections or when undertaking critical stage inspections as required by clause 162A of the EP&A Regulation and compliance must be achieved before the PCA issues an interim or final occupation certificate.

Part A2 of the BCA allows the practitioner to rely upon various forms of evidence to demonstrate the completed pool will comply with the BCA. The accredited certifier may require such forms of evidence for specialised compliance areas of pool construction, such as the steel reinforcing and the water recirculation and filtration systems.

In addition, before issuing the occupation certificate, the PCA must ensure that the pool is suitable for occupation or use in accordance with its classification under the BCA and that any pre-conditions to the issue of the occupation certificate that are specified in the development consent or complying development certificate have been satisfied, such as relating to the location of a filter motor or the insulation box enclosing the filter motor.



Inspections undertaken by the PCA must confirm the swimming pool will comply with all relevant conditions of the consent, including conditions relating to reduced levels, fencing and the correct location and acoustic enclosure of the swimming pool filter motor.

## The meaning of “not inconsistent with” the development consent

A significant number of complaints have been considered before the Department of Planning’s State Assessment Committee which alleged that construction certificates were issued which were inconsistent with the relevant development consent. In 2005, nine proven complaints from the 27 relating to construction certificates involved this issue.

Clause 145(1)(a) of the EP&A Regulation currently states that:

- (1) *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*

Clause 145(2) makes similar provision in relation to a construction certificate for subdivision work.

The Department issued a practice note 'Construction certificates for building work', in *Guiding Development: better outcomes*, which outlined what is meant by "not inconsistent with the development consent". The advice in that practice note is reproduced below.

*A construction certificate cannot be issued if the design details [presented to the certifier at that stage] are inconsistent with the development consent. However, the following points should be noted:*

- *Plans and specifications relied upon for the purpose of obtaining a construction certificate will invariably contain a greater level of detail than that submitted with the development application.*
- *Some variations to the design, siting and construction of the building may have occurred either to comply with a specified condition of development consent or with the BCA, or to improve the efficiency and functionality of the building – compliance with the BCA is a prescribed condition of development consent and a prerequisite to the issue of a construction certificate.*
- *The [EP&A Regulation] recognises that variations may occur when proceeding to this level of detail, by not requiring that the design and construction of the building be strictly in accordance with the development consent.*

*In all cases a judgement as to whether the design and construction of the building or subdivision work are not inconsistent with the development consent will depend on the terms of the development consent – the detail on the plans and the requirements imposed as conditions of the consent. They should be carefully considered. As an example, changes to plans such as the following would be consistent with the development consent:*

- *changes to comply with conditions of development consent*
- *additional details to show compliance with the BCA, generally within the external envelope of the building – such as kitchen detail, moving doors or partitions.*

*The following would be inconsistent with the development consent:*

- *altering the external envelope – relocating windows, altering heights, adding plant rooms where not shown*
- *moving rooms around – changing location of bedrooms and living rooms, increasing the number of rooms*
- *designs not satisfying the conditions of development consent, for instance, conditions requiring modification to plan drawings such as reducing heights or increasing setbacks.*

*In these circumstances a section 96 modification, to vary the development consent, would be required. If there is some doubt about the extent of [the] changes, it should be discussed with the council.*

## Are staged complying development certificates possible?

The Department has been asked for advice as to whether the provisions in the EP&A Act that provide special procedures concerning staged development applications (Part 4 Division 2A) apply to complying development. It is the Department's view that these provisions do not apply to complying development and staged complying development certificates cannot be issued under the EP&A Act.

Complying development is intended to allow for routine development that has been pre-determined to comply with relevant development standards and does not involve the consideration of the merits of a development. It is not intended for more complex developments that may need to be carried out in stages and for which the consent authority can provide the necessary analysis for the staged timing of carrying out of the work.

An applicant may, in accordance with the EP&A Regulation, apply to the local council or an accredited certifier for a CDC for complying development that is specified or defined through the council's local plan. This requires a separate application for each complying development, and each application may be determined by issuing a certificate unconditionally or (to the extent required by the EP&A Regulation, an environmental planning instrument or a development control plan) subject to conditions, or by refusing the certificate.

## One PCA for building and subdivision work under the one consent

Recently, the BPB has been asked to provide advice as to whether, where a development consent relates to both building and subdivision works, two separate PCAs can be appointed – one for the building work and one for the subdivision work.

It is the Department's view that only one PCA can be appointed for a development consent. Under the terms of section 109E(1) of the EP&A Act, the person having the benefit of the development consent may appoint the PCA. The terms of this section make it clear that the PCA is to be appointed *for the development* which relates to a development consent or CDC.

As a result, where the development consent approves both building and subdivision works, only one PCA can be appointed in relation to that development. In addition, unless the council's local environmental plan allows an accredited certifier to be the PCA for development involving subdivision work, then only the council can be the PCA for such a development.

## Issuing strata certificates – dependent on the issue of an occupation certificate?

The BPB has also recently been asked to provide advice as to whether councils are able to impose a condition of consent requiring building works to have reached at least the point at which an occupation certificate has been issued (if an accredited certifier is the PCA) or could be issued (if council was the PCA) before a strata certificate may be issued.

In the Department's view, the imposition of such a condition is not necessary either to ensure that the building attains such a degree of completion within a reasonable time or to protect the interests of purchasers. Of particular relevance is the operation of clause 6 of the Conveyancing (Sale of Land) Regulation 2005, which implies into contracts for sale of lots in a strata scheme the following clauses set out in Schedule 2:

### *Strata units bought "off the plan"*

- (1) The vendor must serve at least 14 days before completion the original or a copy of an occupation certificate within the meaning of the Environmental Planning and Assessment Act 1979 (being an interim occupation certificate or a final occupation certificate) in relation to the building, or part of the building, of which the lot and access to the lot form part.*
- (2) For the purposes of this clause, the part of a building compromising access to a lot is any part of the building reasonably necessary for access to the lot.*
- (3) The purchaser does not have to complete earlier than 14 days after service of the original or copy certificate.*

The above conditions are implied into contracts for the sale of strata lots entered into before the date of registration of the plan and contracts entered into within 12 months of the date of registration of the strata plan.

Where a council seeks to have a development completed in accordance with the development consent, this may be achieved through the issue of an Order 15 under section 121B of the EP&A Act.

The Department does not consider that the imposition of a condition preventing the issue of a strata certificate prior to the issue of an occupation certificate is an appropriate exercise of a council's authority under the EP&A Act to grant development consent subject to conditions.

The occupation certificate is the appropriate mechanism for ensuring the building work is completed and suitable for occupation; the strata certificate should not perform this role.

The Department is working to issue a practice note on strata certification early in 2007.

## Modifying construction certificates

When issuing or relying upon a construction certificate, accredited certifiers need to ensure the information contained in the certificate reflects the latest development consent granted by the consent authority. Recently, the BPB in investigating a complaint found that a construction certificate was inconsistent with a modified development consent granted following a section 96 application under the EP&A Act. It instead reflected the information, plans and specifications contained in the original consent.

It is not uncommon for a development consent to be modified on numerous occasions before and during construction by application under section 96. As a matter of good practice, certifiers should ensure that both the land owner and the principal contractor are aware that the PCA must be informed of any proposed changes to the construction and any changes that are made to the development consent.

When a consent has been modified, the accredited certifier must ensure that the construction certificate is similarly amended on each occasion to reflect the latest changes to the original development consent. Clause 148 of the EP&A Act Regulation allows a certifying authority to modify a construction certificate. The amended construction certificate should be re-assessed against the BCA, the EP&A Act, EP&A Regulation and the requirements of the development consent as modified.

Amended construction certificates as a minimum need to contain the new development description, including the amended development application registration number, determination date, and referenced plans and specifications.

## Approaching State Assessment Committee (SAC) members

Recently the BPB was made aware that an accredited certifier approached an individual member of the SAC in relation to a complaint matter before it for consideration, seemingly in the hope of gaining some information about the SAC's likely decision, and/or to influence the decision that might be made by the SAC on the matter.

The Department reminds all accredited certifiers that such a practice is entirely inappropriate and unethical and may be found to be unsatisfactory professional conduct or professional misconduct. The SAC members work in mostly a voluntary capacity, providing necessary expert assistance to the Department in the consideration of applications for accreditation and the results of complaint investigations. The Building Professionals Board will do likewise, as well as consider the findings of audit investigations, when it commences. The SAC and the Board must be able to carry out those functions in an unfettered manner, considering only the information provided by the relevant parties as part of the formal evidence-gathering exercise.

Members should be free from outside influences in exercising their statutory functions. Under no circumstances should an accredited certifier attempt to discuss an accreditation application, complaint matter or audit investigation matter with a member or members of the SAC or the Board outside a formal meeting of the SAC/Board convened to hear such a matter.

## Issue of CDC and construction certificate for the same development

Certifiers and councils are reminded that where a complying development certificate has been issued for a development, in accordance with the council's local plan and the EP&A Act, a construction certificate is not required for the development.

## Commencement of work without knowledge of the PCA and council

Both the builder/developer and the PCA need to refer to the development consent and the construction certificate or CDC as work proceeds to ensure compliance with the approved plans and consent conditions. The PCA also needs to be aware when critical stage inspections and other required inspections are due to be undertaken in order that an occupation certificate can be issued at the end of the work.

Councils and accredited certifiers are encouraged to adopt a resubmit/recall system to ensure that developments do not commence without the knowledge of the consent authority and the PCA.

## Withholding issue of occupation certificate

The Department is of the view that any alleged dispute between a property owner and a builder does not constitute grounds for withholding the issue of an occupation certificate. In particular, certifying authorities should not withhold the issue of a final occupation certificate where:

- an application for an occupation certificate has been received,
- there is a development consent and construction certificate or CDC in force for the building,
- the building is suitable for occupation or use in accordance with its BCA classification, and
- the development complies with any preconditions specified in the development consent.



When carrying out critical stage inspections, certifying authorities should monitor compliance with relevant conditions of development consent, including safety fencing and traffic management measures.

# NEWS IN BRIEF

## Review of home building licensing

A report on the review into home building licensing has been completed. The report outlines various recommendations from the licensing review which are to be considered alongside the Council of Australian Governments' (COAG) project to allow mutual recognition of interstate qualifications.

A copy of the report is available on the Fair Trading website at [www.fairtrading.nsw.gov.au](http://www.fairtrading.nsw.gov.au).

## Increased home warranty insurance benefits

The Minister for Commerce, the Hon John Della Bosca, recently announced proposed improvements to the home warranty insurance scheme in order to further enhance the effectiveness of the scheme and its ability to deliver a quality product to the builders and consumers of NSW.

The enhancements, due to commence **from 1 March 2007**, will provide additional benefits for consumers by increasing the minimum cover that must be provided by insurers to homeowners under the scheme from \$200,000 to \$300,000 and by removing the existing provision enabling insurers to impose a \$500 excess on claims.

This home warranty insurance scheme provides cover to homeowners in the event of the death, disappearance or insolvency of a builder. Cover is provided in relation to structural defects for a period of six years after completion of the building work and two years for non-structural defects.

For more information, contact the Office of Fair Trading on (02) 9777 8803 or by e-mail at [HWISchemeBoardSM@ofc.commerce.nsw.gov.au](mailto:HWISchemeBoardSM@ofc.commerce.nsw.gov.au).

## BCA 2007 information seminars

In order to promote awareness of the changes to the BCA in 2007, the Australian Building Codes Board (ABCB), in conjunction with Standards Australia, has recently announced its Information Seminars on BCA 2007. This is an annual event and is targeted at raising awareness about the BCA and the changes coming into effect in 2007 among building practitioners.

Half-day seminars will be held in capital cities throughout February and March 2007 and will be divided into an overview of the changes to feature in BCA 2007, presented by the ABCB, followed by an update on changes to related Australian Standards, presented by Standards Australia.

The BCA 2007 Information Seminar in Sydney will be held on **26 or 27 February 2007** at the City Tattersalls Club, 198-204 Pitt Street, Sydney.

For more information, go to [www.abcb.gov.au](http://www.abcb.gov.au) or telephone (07) 3423 0694.

## Certifier supply – have your say

In the last issue the BPB sought comments from readers about the supply of accredited certifiers and/or issues new graduates may face in securing a position as an accredited certifier. Only a limited number of responses have been received. We again encourage you to assist us in making an assessment of this issue by answering the following questions:

1. Do you believe there is currently a shortage of accredited certifiers?      Yes / No  
Please explain and/or provide examples.
2. If yes, in what areas are there shortages?
3. What, if any, are the issues which would stop you remaining an accredited certifier?
4. What, if any, are the barriers to hiring new graduates?
5. How can graduates, or current students, gain the experience required to be an accredited certifier?
6. (a) How closely supervised do unaccredited graduates need to be in order to conduct inspections?  
(b) Do accredited certifiers have the capacity to provide this supervision?
7. Any other comments

Email responses are welcome **by 31 January 2007** to [bpb@bpb.nsw.gov.au](mailto:bpb@bpb.nsw.gov.au).



Soil erosion control measures, where required by conditions of consent, should be checked when inspections are undertaken to ensure they are maintained until such times as the threat of pollution entering the stormwater system ceases.

## Acknowledgement

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

The SAC and Complaints Review Committee (CRC) have been important components in the Department's administration of the BSAP Accreditation Scheme over the past 4 ½ years.

### SAC and CRC members (past and present):

Paul Anderson – Local Government and Shires Associations (LGSA)  
Scott Phillips – LGSA  
Steve Barratt – Australian Institute of Building Surveyors (NSW Chapter) (AIBS)  
Stephen Cullen – LGSA  
Brett Daintry – LGSA  
Geoff Douglass – LGSA  
Roger Dowsett – AIBS  
Russel Grove – AIBS  
Bryan Hardman – AIBS  
Garry Poole – AIBS  
John Rigney – AIBS  
Trevor Taylor – LGSA  
Roman Wereszczynski – AIBS  
Peter Williams – University of NSW  
Michael Wynn-Jones – University of Western Sydney

### Chairs (past and present):

Neil Cocks – Department of Planning  
Stephen Cullen – Department of Planning  
Serge Fijac – Department of Planning  
Julie Heraghty – Department of Planning  
Alan Host – Department of Planning  
Jonathan Lynch – Department of Planning  
Lee Miller – Department of Planning  
Frank Rupolo – Department of Planning

## Best wishes of the season

As another year draws to a close, we would like to thank all of 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 BPBulletin

To receive future issues of the BPBulletin, please email:  
[bpb@bpb.nsw.gov.au](mailto:bpb@bpb.nsw.gov.au)

## Contacting the BPB

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## 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.

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