



# Commencement of EP&A Amendment Act 2012

## Impact of the Amendment Act and other changes from 1 March 2013

The *Environmental Planning and Assessment Amendment Act 2012* (the Amendment Act) contains a number of changes to the *Environmental Planning and Assessment Act 1979* (EP&A Act) and the *Building Professionals Act 2005* (BP Act).

Its commencement on 1 March 2013 represents the first stage of reforms to the building regulation and certification system. Other reforms are expected to be described in the [Planning System White Paper](#).

The Environmental Planning and Assessment Amendment Regulation 2013 (EP&A Amendment Regulation) and the Building Professionals Amendment Regulation 2013 (BP Amendment Regulation) also commence on 1 March 2013. They make additional changes to certification, accreditation and disciplinary matters.

## What is changing under the Amendment Act?

### Compliance cost notices provisions (amended section 121CA)

For some time, councils have been able to recover the cost of monitoring and ensuring compliance with any action taken under an order given under section 121B of the EP&A Act. Councils recover these costs by issuing a compliance cost notice.

However, councils also incur costs when they investigate whether to issue an order and give a notice of intention to give an order. Recovering these costs through issuing a compliance cost notice has previously not been permitted.

The amendment to section 121CA recognises the councils' central role in ensuring compliance with development consents and the extent of associated compliance costs. It enables councils to recover costs and expenses of an investigation that results in an order being given, as well as costs and expenses of preparing and serving a notice of intention where an order has been issued. Councils are required to clearly document the costs incurred in undertaking this work.

Under amended clause 281C of the EP&A Regulation, the costs that can be recovered for this work are:

- up to \$1000 for an investigation that resulted in an order being given
- up to \$500 to prepare and serve a notice of intention to give an order where an order has been given.

Under savings and transitional provisions, these changes apply to orders that are given on or after 1 March 2013.



#### Transfer of records to new principal certifying authority (new section 109NA)

From time to time a principal certifying authority (PCA) appointed to replace another PCA part way through a development experiences difficulties obtaining the necessary records from the previous PCA or their employer, or receiving the records in a timely manner.

Under section 109NA, the replacement PCA can ask the Building Professionals Board to direct the previous PCA, their employer or anyone else the Board reasonably believes has the records, to provide the records to the new PCA. The types of documents or records are those the BP Act and BP Regulation require the PCA to keep.

#### Compliance certificates (amended section 109D(1)(a))

This amendment allows persons other than the consent authority, councils and accredited certifiers to issue compliance certificates. These persons will be prescribed by the regulations at a future time following the completion of work being undertaken by the Board to identify critical aspects of building work that need to be certified by appropriate professionals and practitioners.

These professionals and practitioners are likely to include:

- building designers, engineers, fire safety designers and installers, and access consultants, who would be accredited by the Board, and
- other persons who will be prescribed and may include licensed builders, registered architects and registered land surveyors.

These accredited certifiers and prescribed persons would issue compliance certificates to certify design and construction work complies with relevant standards. They would be able to do so even where they have been involved in the design or construction of the work or where they are related to someone who was involved in the design of the work.

## What is changing under the BP Act?

#### Disciplinary matters (amended sections 19, 31 and 34)

Amendments to sections 31 and 34 of the BP Act clarify that the Board and the Administrative Decisions Tribunal must take into account any previous disciplinary action against a certifier when considering appropriate action where there is a finding of unsatisfactory professional conduct or professional misconduct following a complaint or audit investigation under the Act.

Under the BP Amendment Regulation, this change will impact any disciplinary actions against a certifier that are commenced on or after 1 March 2013, irrespective of when the alleged conduct occurred.

The definition of disciplinary action, which is unchanged, has been moved in the Act from section 38 to section 19.

#### Conflicts of interest for compliance certificates (amended section 66(2))

The BP Act's conflict of interest provisions now enable accredited certifiers who carry out the design of building work or who are involved in the construction, to issue a compliance certificate that certifies the design or construction complies with relevant plans or standards. A certifier can also issue such a compliance certificate if they are related to someone who has been involved in the design of the relevant part of the development.

These changes relax some of the conflict of interest provisions for certifiers in certain circumstances. The accredited certifier, however, cannot issue a false or misleading certificate, they cannot be engaged as the PCA for the work, they will be subject to the code

of conduct contained in the Board's [Accreditation Scheme](#), and they can be audited by the Board.

#### Assessment of accredited certifiers (new section 9A)

The Board can now require an accredited certifier's skills and knowledge to be assessed at any time. This may involve an interview, a written assessment or a practical demonstration. The assessment will enable the Board to ensure the ongoing capability of the certifier to perform the work authorised by their category of accreditation.

Under the changes, the Board can suspend or cancel the certifier's accreditation or impose or vary conditions on their certificate of accreditation, depending on the outcome of the assessment.

#### Written contracts for certification work (amended section 73A)

Our Better Buildings Model consultation during 2012 found that some certifiers have been threatened with non-payment of certification fees unless they issue a particular certificate or a certificate within a specified time. They also receive requests to enter into contracts that potentially place obligations on them that are inconsistent with their responsibilities under the EP&A Act and EP&A Regulation.

To address these issues and increase the awareness of the role of certifying authorities within the general public, section 73A has been amended to require a certifier or their employer to enter into a written contract in relation to certification work undertaken by the certifier.

Carrying out certification work without a written contract that complies with the BP Regulation can be found to be unsatisfactory professional conduct or professional misconduct.

Under savings and transitional provisions, certifying authorities must enter a written contract for all certification work except work that has commenced, or is under a contract entered into, before 1 March 2013.

Under the BP Act, certification work is defined as:

- the determining of an application for any development certificate
- the carrying out of the functions of a principal certifying authority under the EP&A Act
- the carrying out of inspections for the purposes of section 109E(3)(d) of that Act
- the carrying out of inspections for the purposes of section 22C of the *Swimming Pools Act 1992* and the issuing of certificates of compliance under that Act.

Clause 19A of the BP Amendment Regulation 2013 sets out the matters that need to be included in a written contract. In addition, clause 19A specifies when fees and charges are to be paid under the contract.

The Board will shortly release the following template contracts to assist certifying authorities:

- contract for individual certifiers
- contract for employer councils
- contract for other employers.

## What's changing under the EP&A Regulation 2000?

#### Issue of occupation certificates (new clause 154(1A))

A construction certificate can only be issued under the EP&A Regulation where, among other things, the design and construction of the building as shown in the plans and specifications are not inconsistent with the development consent.



Clause 154(1A) introduces the same test for the issue of an occupation certificate (OC). Under the amendment, an OC for a new building or part of a new building cannot be issued unless the design and construction of the work is not inconsistent with the development consent or complying development certificate (CDC).

This amendment only applies where the development consent or CDC is issued on or after 1 March 2013.

## What's changing under the BP Regulation 2007?

### Accreditation fees for council certifiers

The Board is reviewing all accreditation fees and associated fees. Until that review is finalised, the BP Regulation has been amended to maintain the accreditation fees for council accredited certifiers at the current level. That is:

- for applicants for council accreditation who have been approved by the Board to be in the transitional qualifications provisions pool – no fee
- for renewal of council accreditation - \$250.

## Consequential amendments

The Amendment Act also repeals some uncommenced provisions of the Environmental Planning and Assessment Amendment Act 2008 and Building Professionals Amendment Act 2008 that would have required building professionals to issue design certificates. These provisions will be replaced by proposals to accredit additional professions.

## More information

- View the [EP&A Amendment Act 2012](#)
- View the [Amendment Regulations](#)
- View [Q&A on the amendments](#)

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