

Responsibilities of employees of accredited bodies corporate

Introduction

- Once a body corporate is accredited, the *Building Professionals Act 2005* (BP Act) and Building Professionals Regulation 2007 (BP Regulation) place a number of obligations on its accredited certifier employees, accredited certifier directors and those concerned in the management of the body corporate. This information sheet summarises those obligations.
- Info Sheet 12 sets out how a body corporate can become accredited (available at www.bpb.nsw.gov.au).
- Info Sheet 13 summarises the obligations on accredited bodies corporate (available at www.bpb.nsw.gov.au).
- For an outline of the changes to the BP Act and BP Regulation to enable the accreditation of bodies corporate, see Circular PS 08-011 *Commencement of provisions on 3 November 2008 – accredited bodies corporate*, available at www.bpb.nsw.gov.au.

Responsibilities of accredited certifier directors

- Each accredited body corporate must have at least one accredited certifier director employed at all times it carries out certification work (section 72C(3) of the BP Act).
- The BP Act places a number of obligations directly onto each accredited certifier director, in addition to their obligations as individual accredited certifiers, and accredited certifier employees of an accredited body corporate.
- **Body corporate carrying out certification work** [section 72A(1)(a)]
 - Accredited certifier directors must ensure that the body corporate, in the carrying out of certification work, complies with the requirements of the BP Act and any other Act.
 - In addition, accredited certifier directors must ensure that the body corporate has appropriate management systems in place to ensure the body corporate complies with those requirements.
- **What are appropriate management systems for this purpose?**
 - To comply with section 72A(1)(a) of the BP Act, it is recommended that an accredited body corporate have systems of management that, at a minimum, address the following matters:

- that the certification work carried out by the body corporate and accredited certifier employees on behalf of the body corporate is carried out in accordance with the requirements of the *Environmental Planning and Assessment Act 1979* (EP&A Act) and regulations,
 - that all decisions relating to certification work and the reasons for these decisions are clearly and consistently recorded and documented,
 - that accredited certifier employees are managed and supervised in accordance with the requirements of the BP Act and that all employees, whether or not they are accredited certifiers, comply with the body corporate's systems of management, and
 - that there is clear, appropriate and prompt communication with internal and external persons, including the principal, employees, contractors, councils and regulatory bodies as required while carrying out the statutory duties of the body corporate,
 - that the requirements of the BP Act, including maintaining required insurance, identifying and managing conflicts of interest, record keeping, notifying the Board of matters required under the BP Act, ensuring the body corporate operates within its scope of accreditation and carrying out appropriate document control are complied with by the body corporate.
- Accredited bodies corporate should document the procedures that constitute their systems of management and have processes in place to rectify problems should the procedures fail. The body corporate's systems of management should be reviewed regularly.
 - Sound systems of management are an important part of the work of any organisation and will help an accredited body corporate to manage risk and comply with its statutory responsibilities.
- Allocating work to employees** [section 72A(1)(b)]
- Accredited certifier directors must ensure that the certification work to be undertaken by the body corporate is allocated to, and undertaken by, a director or employee of the body corporate who holds a certificate of individual accreditation that authorises them to undertake the relevant work.
 - While the body corporate can be appointed to be the principal certifying authority (PCA), or act as the certifying authority, the actual certification work to be performed must be carried out by an appropriately accredited and competent individual accredited certifier.
 - The Code of Conduct for Accredited Certifiers (Requirement 9) obliges individual accredited certifiers to carry out certification work only within their competence, despite the category of accreditation in which they have been accredited. Accredited certifier directors should keep this requirement in mind when allocating work to their employees.
 - Any Part 4A or complying development certificates issued by the body corporate must be signed by the individual accredited certifier who was responsible for carrying out the certification work and issuing the certificate (clauses 134(1), 138(1), 147(1), 155(1) and 160(1) of the Environmental Planning and Assessment Regulation 2000).
 - The accredited certifier director can allocate different certification work relating to the same development to different accredited certifier employees, as long as they hold the appropriate accreditation. For example, one accredited certifier employee may issue the construction certificate for a development and another accredited certifier employee may issue the occupation certificate; one accredited certifier may carry out critical stage and other inspections and another may issue the occupation certificate.

Keeping the principal informed [section 72A(1)(c)]

- Accredited certifier director(s) must also ensure that the person for whom certification work is undertaken (the principal) is kept informed as to the identity of the individual accredited certifier who is responsible for undertaking the relevant work.
- This requirement is to ensure that the principal can contact the responsible accredited certifier with any questions about the work that is being certified.
- As a means of enabling any inquiries or complaints about a development to be directed to the individual accredited certifier, an accredited certifier director should also provide relevant telephone numbers to the principal. The principal should be able to contact the accredited certifier during office hours.
- Where the body corporate re-allocates the certification work, or part of the certification work, to another accredited certifier employee, the accredited certifier director(s) is also required to notify the principal of the change and of the details of the new accredited certifier.
- Any notification to the principal should be carried out as soon as possible after the work is allocated or re-allocated.
- If a body corporate has one or more accredited certifier directors, each of the above obligations is placed equally on each of those accredited certifier directors.

Reporting unsatisfactory conduct of accredited certifier employees [section 72A(2) BP Act]

- Accredited certifier directors are also under a duty to report to the Board any possible unsatisfactory professional conduct or professional misconduct of the body corporate or another accredited certifier director or accredited certifier employee of the body corporate as soon as possible after becoming aware of the conduct.
- Accredited certifier directors are to be guided by the definitions of unsatisfactory professional conduct and professional misconduct in section 19(1) of the BP Act to ensure they report all relevant conduct.
- The accredited certifier director does not have to be sure that a matter falls within these definitions, only that there is possible conduct that may be unsatisfactory professional conduct or professional misconduct.
- This is a serious obligation on accredited certifier directors. A breach of the obligation by an accredited certifier director can itself be unsatisfactory professional conduct or professional misconduct (section 72A(3) BP Act). Accredited certifier directors are advised to err on the side of caution and report to the Board conduct that may constitute unsatisfactory professional conduct or professional misconduct.
- The responsibility to make a report to the Board falls equally on each accredited certifier director in the accredited body corporate (section 72A(4) BP Act). Each accredited certifier director is required to notify the Board about relevant conduct known to the certifier unless they can demonstrate that they have an arrangement with another accredited certifier director of the body corporate for the latter to make the report to the Board. Such an arrangement should be in writing and should be specific to the matter; a general agreement that another accredited certifier director will make all such reports to the Board is not sufficient.

Remaining fit and proper persons [sections 7(1A)(d), (f)-(h), 8(2A)(a), (e)-(g), (i) BP Act]

- The Board can refuse to renew a body corporate's accreditation or can suspend or cancel the accreditation if it is not satisfied a director of the body corporate, or a person concerned in the management of the body corporate, is a fit and proper person. Similar to ensuring they maintain their own individual accreditation (section 7(1)(d) BP Act), accredited certifier directors need to ensure they remain fit and proper to be accredited certifiers. This obligation, however, extends to all directors and persons concerned in the management of the body corporate, not just those who are accredited certifiers.
- Accredited certifier directors' conduct can result in the body corporate, of which they are a director, losing its accreditation (as well as the director's own accreditation) if they contravene a law that relates to the functions or obligations as an accredited certifier (or equivalent), fail to comply with a statutory or other duty, or contractual obligation, imposed on the director that relates to the functions or obligations of a person as an accredited certifier (or equivalent), or become an undischarged bankrupt, have a disciplinary finding made against them, or fail to comply with an order of the Board following a disciplinary finding.

Keeping documents and records [clauses 8 and 8A BP Regulation]

- Section 60 of the BP Act and clause 8A of the BP Regulation require the accredited body corporate to keep a number of documents and records obtained or created by the body corporate or by an accredited certifier director or accredited certifier employee of the body corporate in the course of carrying out certification work on behalf of the body corporate.
- These records are summarised in Info Sheet 13, *Responsibilities of accredited bodies corporate*, October 2008.
- Where a body corporate ceases to be accredited, the person who last held the position of accredited certifier director of the body corporate before it ceased to be accredited, and who is still an accredited certifier, must keep the documents and records formerly of the accredited body corporate as required by clause 8A of the BP Regulation.
- If there is more than one relevant former accredited certifier director, they can make an arrangement between them as to how the documents and records are to be secured.

Avoiding conflicts of interest [sections 66(5) and (6) BP Act]

- Section 66 of the BP Act and clauses 17 and 18 of the BP Regulation prevent accredited certifiers (individual and corporate) from issuing a Part 4A or complying development certificate where certain specified conflict of interest situations arise.
- Section 66(5) also prohibits an accredited certifier director from issuing a Part 4A or complying development certificate where the accredited body corporate, or another accredited certifier director or accredited certifier employee of the body corporate, would be prohibited from issuing the certificate under section 66(1).
- If an accredited certifier director issues a certificate where they are prohibited from doing so under section 66(1), the body corporate is also taken to have contravened that subsection.

Carrying out other obligations [section 72B BP Act]

- Accredited certifier directors must continue to comply with their obligations under the BP Act and EP&A Act and regulations in carrying out any certification work, even when it is done by the person on behalf of or in the name of the body corporate. Accredited certifier directors are subject to the same requirements in

relation to carrying out the functions of a certifying authority on behalf of the accredited body corporate as if he or she were the certifying authority.

Offences by the accredited body corporate [section 93A BP Act]

- Accredited certifier directors need to be aware that if the body corporate contravenes any provision of the BP Act or BP Regulation, each director, including each accredited certifier director, and each person concerned in the management of the corporation, is taken to have contravened the same provision if the person knowingly authorised or permitted the contravention. Such a person can be proceeded against and convicted whether or not the body corporate has been proceeded against or convicted.

Must an accredited certifier director ensure its employees meet the terms and conditions of their accreditation?

- There is no direct responsibility on accredited certifier directors to do so. The obligation on an accredited certifier director to report any possible unsatisfactory professional conduct to the Board under section 72A(2) of the BP Act, however, may impose an associated obligation to ensure the accredited certifier employees are complying with the terms and conditions of their accreditation.
- In addition, the accredited certifier director's responsibility to ensure the body corporate complies with the Act in the carrying out of certification work (section 72A(1) has an associated obligation to ensure the employees comply with the Act as section 72C(1) requires the accredited body corporate to ensure that any certification work that is done in the name of or on behalf of the body corporate is done by a director or employee of the body corporate who holds the relevant accreditation.
- Nevertheless, individual accredited certifiers who are employed by an accredited body corporate retain responsibility for ensuring that they comply with the terms and conditions of their accreditation. An individual accredited certifier can be found guilty of an offence if they carry out certification work that is not authorised by their certificate of accreditation (section 72 BP Act).
- The accredited body corporate must also maintain the required insurance to cover its accredited certifier employees (see Info Sheet 12, *Accreditation of bodies corporate*, October 2008).

Responsibilities of accredited certifier employees (other than directors)

- Accredited certifiers who are employed by an accredited body corporate continue to have the same responsibilities as all other accredited certifiers. In summary, they must undertake their continuing professional development requirements under the accreditation scheme, comply with the code of conduct in the scheme, ensure they hold insurance for the whole period of their accreditation, carry out certification work only in accordance with the terms and conditions of their accreditation and in accordance with the requirements of the EP&A Act and Regulation, and remain fit and proper persons.
- If an accredited certifier employee is also concerned in the management of the body corporate, the accredited certifier has a number of other responsibilities under the BP Act and BP Regulation (see below).

Who can carry out certification work on behalf of an accredited body corporate?

- The BP Act allows only accredited certifiers who are employees or directors of an accredited body corporate to carry out certification work on behalf of that accredited body corporate.
- Accredited certifier directors must allocate work to appropriately accredited employees or directors (section 72A(1)(b)) and the accredited body corporate

must ensure that any certification work done in the name of or on behalf of the body corporate is done by an appropriately accredited director or employee (section 72C(1) BP Act).

- If an accredited certifier is contracted to carry out certification work for an accredited body corporate, they must be an employee of the company in order to be able to carry out that work. It is up to the accredited body corporate to make arrangements for the contractor to be an employee of the company.
- Generally, a contractor will be an employee if they have all of the advantages, and are subject to all of the requirements, of employment by the body corporate as all other employees are, eg they are covered by the body corporate's professional indemnity insurance, they obtain a regular salary, they receive leave entitlements and the like.

Responsibilities of persons concerned in the management (other than accredited certifier directors)

- Persons concerned in the management of an accredited body corporate can be company officers who include other directors and managers, the chief executive officer and chief financial officer. These people do not have to be accredited certifiers. The BP Act does not define the term and when a body corporate seeks accreditation it is required to provide to the Board a list of persons who are concerned in the management of the body corporate.
- It is important for the proper carrying out of the responsibilities of accredited bodies corporate, accredited certifier directors and accredited certifier employees that sound management and management practices are in place throughout the corporate structure. As a result, the BP Act and Regulation place responsibilities also upon those who are not accredited certifiers but are concerned in the management of the accredited body corporate.

Being fit and proper persons

- When a body corporate is first accredited, the Board requires the body corporate to provide declarations from all persons concerned in the management of the body corporate as to whether they are fit and proper persons.
- When an accredited body corporate seeks to renew its accreditation, the Board can refuse the renewal where it is not satisfied that a director, or a person concerned in the management, of the body corporate is a fit and proper person (section 7(1A)(d) of the BP Act).
- In addition, the Board can refuse a renewal of accreditation where a person concerned in the management of a body corporate:
 - has contravened a law that relates to the functions or obligations of a person as an accredited certifier or the holder of an equivalent authorisation, or that involved fraud or dishonesty (section 7(1A)(f) BP Act),
 - has failed to comply with a statutory or other duty, or a contractual obligation, that relates to the functions or obligations of the person as an accredited certifier or holder of an equivalent authorisation (section 7(1A)(g) BP Act),
 - is an undischarged bankrupt (section 7(1A)(h) BP Act), or
 - has had a disciplinary finding made against him or her (whether under the Act or the EP&A Act) that resulted in the suspension or cancellation of his or her certificate of accreditation (clause 5A(b) BP Regulation).
- The Board is concerned to ensure is that the person continues to remain suitable to be involved in the management of a company that carries out certification work in the public interest.
- Where a person concerned in the management of a body corporate is not, in the opinion of the Board, a fit and proper person or is an undischarged bankrupt, the

Board can also suspend or cancel the accredited body corporate's accreditation (section 8(2A) BP Act).

Avoiding misrepresentations [section 8(2A)(a) BP Act]

- An accredited body corporate can have its accreditation suspended or cancelled if its certificate of accreditation was issued on the basis of a misrepresentation by a person concerned in the management of the body corporate. This can occur whether or not the person did so deliberately or knowingly.

Offences by the accredited body corporate [section 93A BP Act]

- Similarly to accredited certifier directors, persons concerned in the management of an accredited body corporate need to be aware that if the body corporate contravenes any provision of the BP Act or BP Regulation, each person concerned in the management of the corporation is taken to have contravened the same provision if the person knowingly authorised or permitted the contravention. Such a person can be proceeded against and convicted whether or not the body corporate has been proceeded against or convicted.

Can a complaint be made against a person concerned in the management of an accredited body corporate?

- No, unless they are also an accredited certifier. A complaint may only be made to the Board under the BP Act in relation to the professional conduct of an accredited certifier.

Findings of unsatisfactory conduct [section 31(4) BP Act]

- Where the Board finds a body corporate or an accredited certifier who is a director or employee of the body corporate guilty of unsatisfactory professional conduct or professional misconduct following a disciplinary hearing, the Board has power to disqualify the accredited certifier from being an accredited certifier director or otherwise concerned in the management of, an accredited body corporate for a specified time.