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## EXHIBITION OF DRAFT REGULATION AND ACCREDITATION SCHEME

The BPB is pleased to announce that the draft Building Professionals Regulation 2006 and draft accreditation scheme to be made under the *Building Professionals Act 2005* (BP Act) are on exhibition for public comment until **25 August 2006**.

The draft Regulation will be a new regulation aimed at ensuring the effective operation of the BP Act. It contains provisions that identify categories of accreditation for private certifiers, sets out accreditation fees and insurance requirements for certifiers, further defines conflicts of interests for certifiers, and provides for transitional arrangements, penalty notices and record keeping requirements for certifiers.

A regulatory impact statement (RIS) has also been released. It analyses each of the provisions in the draft regulation.

The new scheme will replace the four existing accreditation schemes and will, for the first time, contain comprehensive criteria that apply to all persons seeking accreditation.

The scheme will also set out the assessment process for accreditation, require accredited certifiers to comply with one set of conduct and ethics requirements and ensure all accredited certifiers undertake comprehensive professional development.

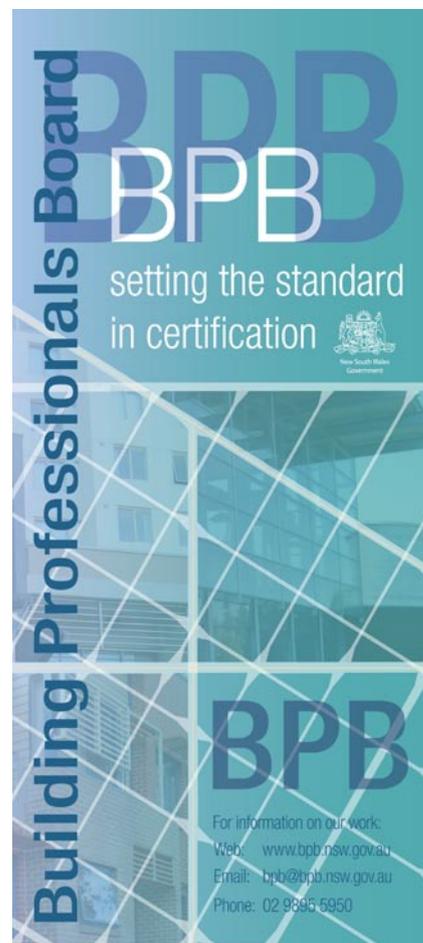
The draft regulation, RIS & draft scheme are available at [www.bpb.nsw.gov.au](http://www.bpb.nsw.gov.au)

### How to find out more

The Department has released a series of information sheets to explain the proposals – available at [www.bpb.nsw.gov.au](http://www.bpb.nsw.gov.au)

A series of half-day briefing sessions have also been arranged to provide an overview of the BP Act, draft Regulation and draft scheme. The sessions include opportunities for structured feedback on the proposed new accreditation processes.

To register for a session, please visit [www.bpb.nsw.gov.au](http://www.bpb.nsw.gov.au)



# RECENT CHANGES AFFECTING CERTIFIERS AND COUNCILS

## Building Code of Australia 2006

The Building Code of Australia (BCA) 2006 **took effect in NSW on 1 May 2006.**

Applications for construction and complying development certificates received on or after 1 May 2006 must comply with BCA 2006 except for the new energy efficiency provisions of Part J for commercial buildings (Classes 5 to 9), which are subject to a six-month transition period, becoming mandatory on 1 November 2006.

In summary, the changes to Volumes One and Two of the BCA included in BCA 2006 are:

- minor technical and editorial changes
- major components, including:
  - update of referenced Australian and Australia/New Zealand Standards to include new and amended versions
  - new provisions for energy efficiency for commercial buildings (Classes 5 to 9)
  - enhanced energy efficiency provisions for residential buildings and parts (Classes 1, 2, 3 and 4)
  - new provisions for national testing regime for buildings in cyclonic areas

Details of the BCA 2006 amendments are provided in Department of Planning Circular BS 06-003 Changes to the Building Code of Australia 2006 available at [www.planning.nsw.gov.au](http://www.planning.nsw.gov.au)

## Smoke Alarms Regulation

The Environmental Planning and Assessment Amendment (Smoke Alarms) Regulation 2006 requires property owners to ensure smoke alarms are installed in existing premises where people sleep. It **commenced on 1 May 2006.**

The Department of Planning has recently issued an information package regarding the requirements of the “Smoke Alarms” Regulation. The package is available at [www.planning.nsw.gov.au/smokealarms](http://www.planning.nsw.gov.au/smokealarms)

Also see [www.planning.nsw.gov.au/planningsystem/brans.asp](http://www.planning.nsw.gov.au/planningsystem/brans.asp) and [www.fire.nsw.gov.au/community/athome/smokealarms](http://www.fire.nsw.gov.au/community/athome/smokealarms) for further important information on smoke alarms and the new requirements.

## BASIX Completion Receipts

The Building Sustainability Index (BASIX) Completion Receipt is a new system that **commenced across the State on 1 July 2006.**

The Environmental Planning and Assessment Amendment (Building Sustainability Index: BASIX) Regulation 2006 requires the principal certifying authority (PCA) to apply to the Director-General of the Department of Planning – through the BASIX website [www.basix.nsw.gov.au](http://www.basix.nsw.gov.au) – for a BASIX Completion Receipt within 2 days after issuing a final occupation certificate for a BASIX-affected building. The BASIX Completion Receipt is a post-occupation certificate requirement.

All PCAs have been issued with a username and password to access the BASIX Completion Receipt web-tool. Only PCAs can access this part of the BASIX website.

The Completion Receipt is not a statement that the PCA has correctly, or otherwise, certified all relevant BASIX commitments in the (original) BASIX Certificate that accompanied the development application or complying development certificate (CDC) application. It does, however, enable the NSW Government to monitor BASIX-compliant homes’ energy and water consumption, to ensure BASIX is achieving the forecasted savings.

A requirement to obtain a Completion Receipt applies only to a BASIX-affected building (or part of such a building) for which a final occupation certificate has been issued on or after 1 July 2006. This includes new buildings containing a dwelling and changes of use to a dwelling. This means that development applications or CDC applications lodged before 1 July 2006 may be affected by the new amendment regulation.

The Completion Receipt requirement does not affect an application for an occupation certificate, the determination of an application for the occupation certificate, or the form of the occupation certificate for the building.

For more information on BASIX and BASIX Completion Receipts, visit [www.basix.nsw.gov.au](http://www.basix.nsw.gov.au), email [basix@planning.nsw.gov.au](mailto:basix@planning.nsw.gov.au) or telephone 1300 650 908.

## CodeMark – new certification scheme for building products and systems

The new CodeMark scheme for the certification of building products and systems replaces the previous Australian Building Products and Systems Certification Scheme administered directly by the Australian Building Codes Board (ABCB), which is no longer in operation.

To give effect to CodeMark in NSW, a number of amendments have been made to the Environmental Planning and Assessment Act 1979 (EP&A Act) and Environmental Planning and Assessment Regulation 2000 (EP&A Regulation). These changes **came into effect on 23 June 2006**.

Under the changes, accreditation of building products and systems under the CodeMark scheme is recognised as proof of compliance with the BCA. Therefore, when a product or system is accredited in accordance with the EP&A Regulation, consent and certifying authorities cannot refuse to issue development consents, CDCs or construction certificates on the ground that a building product or system does not comply with a requirement of the BCA.

The changes are more fully explained in Department of Planning Circular BS 06-006 available at <http://www.planning.nsw.gov.au/planningsystem/brans.asp>

## New principal LEPs and complying development

In September 2004, the then Minister for Infrastructure, Planning and Natural Resources announced a major overhaul of the NSW planning system, to reduce the time taken to assess development proposals and eliminate red-tape.

One of the key components of this reform package involved the creation of a standard template for local environmental plans (LEPs), aimed at achieving consistency in the format, terminology and zones adopted by LEPs across NSW.

On 31 March 2006, the Standard Instrument (Local Environmental Plans) Order 2006 was gazetted, which sets out a template for preparing new LEPs in NSW using a standard set of zones, provisions and definitions. For the first time, local plans across NSW will use the same planning language and NSW will move from having 5500 local planning instruments to 152 – one for each council area.

Every local council will prepare a new principal LEP, applying the standard instrument, for their local government area within 2 to 5 years from gazettal of the Standard Instrument. Councils only need to apply the Standard Instrument once they prepare a new principal LEP.

The Standard Instrument requires a compulsory clause on complying development that generally incorporates the provisions of State Environmental Planning Policy (SEPP) 60. When a council's new LEP is made, the provisions of SEPP 60, or the council's existing complying development control plan (DCP), will no longer apply to that local government area. Instead, the council's rules for complying development will be set out in Schedule 3 of its new LEP.

The Standard Instrument allows councils to specify areas where complying development will not apply in their local area.

Placing complying development requirements in LEPs will provide better access for consumers to the complying development requirements of their local government area.

The Department of Planning is also looking to ensure that maps that are adopted as part of new LEPs are standardised, including maps which help to define complying development, e.g. flood prone land mapping, acid sulphate soils, etc. It is intended that all LEP maps will be available on-line in the near future.

A Planning Circular and series of Practice Notes on the Standard Instrument are available at [www.planning.nsw.gov.au](http://www.planning.nsw.gov.au)

# FOCUS ON THE BPB – COMPLAINTS UNIT

The BPB has three core functions - accrediting individuals as accredited certifiers, investigating complaints made about accredited certifiers and conducting proactive investigations (audits) into the work and activities of certifying authorities (accredited certifiers and Councils). In the second of a series of articles looking at the various units in the BPB, the functions of the Complaints Unit are explained.

At present, the BPB investigates complaints made against private certifiers accredited under the Building Surveyors & Allied Professions (BSAP) accreditation scheme. Complaints made against private certifiers accredited under other accreditation schemes are investigated by the relevant accreditation body, i.e. Engineers Australia, Planning Institute of Australia and Professionals Surveyors' Occupational Association.

## Complaints process

In Issue One, we outlined the complaints process, including available sanctions, in the EP&A Act and EP&A Regulation under which the accreditation bodies investigate and consider complaints.

A person may make a complaint to the BPB against an accredited certifier on the grounds that the certifier has been guilty of unsatisfactory professional conduct or professional misconduct. These grounds are defined in section 109R of the EP&A Act.

The BPB must conduct an investigation into each complaint. The complaint investigation usually involves seeking copies of development consents, plans, documents and other information relating to the determination of Part 4A certificates and/or role of the PCA under the EP&A Act. The BPB also seeks submissions from the certifier in relation to the allegations in the complaint. In some instances an inspection of the development site is necessary to evidence the nature and extent of the building works that have been certified.

A complaint investigation report is prepared for consideration by the Department's Complaints Review Committee (CRC). The CRC comprises a representative from the Local Government & Shires Associations (LGSA), the Australian Institute of Building Surveyors (AIBS) and the Department of Planning. The CRC makes a recommendation as to whether or not there is a reasonable likelihood that the accredited certifier would be found guilty by the Administrative Decisions Tribunal (ADT) of unsatisfactory professional conduct or professional misconduct.

The CRC's recommendation is submitted to the State Assessment Committee (SAC) for consideration. The SAC has representatives from the LGSA, AIBS, Development and Environmental Professionals' Association, University of Western Sydney, University of NSW and the Department of Planning who have expertise in planning, building and certification functions. The SAC's recommendation is submitted to the Director-General or his delegate (usually the Director of the Building Professionals Branch). The Director-General/delegate gives consideration to, is not bound by the recommendations of the CRC/SAC in determining the complaint.

## Matters for consideration – penalties

Due to the limited number of cases conducted in the ADT under Part 4B of the EP&A Act, there is little precedent as to penalties accreditation bodies should impose for unsatisfactory professional conduct. In the absence of such cases, the Department has regard to the following general principles when determining a sanction/penalty following a finding of unsatisfactory professional conduct:

1. deterrence – personal and general
2. the objects of the legislation
3. the nature, width and extent of the contravention(s)
4. the loss or damage and prejudice resulting from the contravention(s)
5. the circumstances in which the contravention(s) took place
6. whether the accredited certifier has engaged in any similar conduct which has been the subject of a disciplinary finding
7. the presence of fraudulent or dishonest intent and deliberation on the part of the accredited certifier
8. the extent of carelessness or wilfulness of the conduct

9. the efforts made to correct the situation, including any measures that have been taken by the accredited certifier
10. the consciousness the accredited certifier had and displayed, of his or her legislative obligations
11. the effect upon the accredited certifier of the penalty or sanction imposed
12. antecedents, e.g. previous findings of unsatisfactory professional conduct or professional misconduct
13. attitude of the certifier, his or her certification history and steps taken by the certifier to ensure compliance is observed in the future
14. the penalty range relating to the particular contravention(s)

When the BP Act commences, the BP Board will take over the complaint functions of the Department and the other accreditation bodies. The changes to the complaint process to be brought about by the BP Act are explained in *Building Professionals Act 2005: a guide* available at [www.bpb.nsw.gov.au](http://www.bpb.nsw.gov.au).

## Analysis of 2005 complaints

This Bulletin regularly provides feedback to certifiers and Councils about the Department's complaints' investigations under the heading 'Recent Complaints' Findings'. The Department has recently adopted the practice of preparing summaries of all complaint findings with a view to publishing them in a single document to assist certifiers and Councils in improving practice.

The information below presents an analysis of all allegations of unprofessional conduct against BSAP certifiers determined in 2005. The results provide an overall picture of the more common errors made by accredited certifiers.

### Complaint determinations

The Department received 56 complaints under the BSAP scheme in 2005 and determined 102 complaints. Table 1 shows the number of complaint determinations issued by the Department by determination type in that year.

**Table 1: Complaints determined by determination type (2005)**

Type of determination	No. of complaints
Dismissed	35
Terminated	4
Cautions	45
Reprimands	11
Report on practice + caution	1
Referred to Administrative Decisions Tribunal	6
<b>Total no. of complaints determined in 2005</b>	<b>102</b>

Table 2 shows complaint determinations by complainant. Local Councils made the majority of complaints (61.8%), followed by neighbours (18.6%).

**Table 2 : Complaint determination type by complainant**

Type of determination	Complainant					TOTAL
	Local Council	Neighbour	Landowner/ Developer	NSW Fire Brigades	Other	
Dismissed	18	11	-	3	3	35
Terminated	1	2	-	-	1	4
Caution	30	5	4	2	4	45
Reprimand	8	1	2	-	-	11
Report	1	-	-	-	-	1
ADT	5	-	-	1	-	6
<b>TOTAL</b>	<b>63</b>	<b>19</b>	<b>6</b>	<b>6</b>	<b>8</b>	<b>102</b>

Of the complaints determined in 2005:

- 100% of complaints by landowners/developers resulted in findings of unsatisfactory professional conduct by the certifier involved
- 69.85% of complaints by councils, 50% of complaints by the NSW Fire Brigades, and 31.6% of complaints by neighbours resulted in findings of unsatisfactory professional conduct

### Types of errors

After removing dismissed complaints and terminated investigations, proven allegations\* have been grouped by type in Table 3 below.

\* (Note: there is often more than one allegation per complaint. The analysis below concerns proven errors including if several different errors were made while certifying the same development or in the issue of one certificate. Some errors are counted twice where they fall into more than one category).

**Table 3: Complaints determined by allegation type (2005)**

Allegation type	No. of times proven
<b>Construction certificate</b>	
Breached condition of consent	10 <sup>1</sup>
Inconsistent with development consent	9
Inconsistent with BCA	8
<b>Occupation certificate</b>	
Breached condition of consent	4
Inconsistent with development consent	6
Issued when building not fit for occupation <sup>2</sup>	7
<b>Complying development certificate</b>	
Contrary to requirements of DCP / LEP	17
<b>Compliance certificate</b>	
Issued incorrectly	0
<b>Defective PCA monitoring / inspections (incl. failure to issue notice of intent)</b>	
Building works not in accordance with development consent	8
Building works inconsistent with BCA	3
<b>Accreditation</b>	
Breach of scheme	2
Acting beyond accreditation authorisation / breach condition of accreditation	6
Breach of code of conduct	1
Unprofessional, improper or unethical conduct	1
Other breach of Act or regulation	24 <sup>3</sup>
<b>TOTAL</b>	<b>106<sup>4</sup></b>

Notes:

1. Inconsistent with development consent includes being inconsistent with construction plans, e.g. a higher deck elevation than detailed on the construction plan. A breach of a condition of consent is broader and may include, for instance, the absence of a privacy screen when one was required by the consent.
2. This includes issuing an occupation certificate when the building does not comply with the BCA.
3. These comprise breaches of the EP&A Act or EP&A Regulation. A further breakdown of proven allegations in this category is provided in Table 4.

**Table 4: Proven allegation-other breach of Act or regulation**

Proven allegation	No. of times proven
Construction certificate issued with incorrect details/ omitting required details	7
Construction certificate issued without payment of long service levy or other fees	3
Council not notified of issue of certificate as required	4
Certificate issued without required approvals in place	2
Certificate not signed by appointed certifier	2
Failure to refer construction certificate proposal to Fire Brigades	2
CDC determined before neighbours notified	1
Notice of intent issued with incorrect details or omitting required details	1
Retrospective issue of CDC	1
Issue of certificate without application	1
<b>Total</b>	<b>24</b>

4. Fifteen (15) of the above allegations were subject to decisions of the ADT rather than the Department of Planning.

### *Messages for certifying authorities*

Amongst other things, this information shows the importance of certifiers paying attention to detail, for instance:

- ensuring all “pre-conditions” to the issue of a construction or occupation certificate specified in a development consent are met prior to the issue of those certificates
- ensuring the construction certificate plans are not inconsistent with the development consent
- checking all details of the relevant council’s complying DCP or LEP (e.g. whether the proposed development site is within a conservation or environmental protection area) to ensure that the proposed development is complying development before issuing a CDC
- ensuring any certificates issued contain all required details, e.g. name of the accreditation body and name and address of the applicant, attach all required documents such as plans, detail the building classification, and that fire safety schedules contain all required details
- ensuring Council is correctly notified of certification determinations as required under the EP&A Regulation



Certifiers must ensure that access ramps for disabled persons comply with the grade and construction requirements of AS 1428.1

# RECENT COMPLAINTS' FINDINGS

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

In December 2005, the Department commenced proceedings in the ADT against accredited certifier Jennifer Dallas in respect of two complaints lodged with it by Wyong and Gosford Councils.

The complaints related to ten individual developments. In nine of these developments it was alleged that CDCs had been issued for building projects that were not complying development under the relevant planning instruments due to factors such as:

- development in an area that is prone to bushfire or flooding or is affected by acid sulphate soils
- development on land situated within 50 metres of a beach that has been subject to a coastal processes study
- development not in a precinct in which such development (a two storey dwelling) was permitted as complying development
- development that did not meet building standards such as height and setback requirements

In the case of the other development, it was alleged that the conflicts of interest provisions of the BSAP Code of Conduct had been breached.

Whilst the Councils have not taken other action in respect of most of the affected developments (many only being identified post construction), Council intervention was required in order to have the two storey dwelling proceed by way of a development application. More disturbingly, Gosford Council was required to take action in the Land and Environment Court to have the CDC issued for the construction of a deck at a beachfront property declared invalid. The Court also made orders requiring the deck to be partially demolished.

The Tribunal was not required by the parties to make a determination on whether the allegations in the complaints were proven – on 22 June 2006 the Tribunal made the following orders by consent under section 86 of the *Administrative Decisions Tribunal Act 1997*:

1. That Ms Dallas be issued with a reprimand, and
2. That Ms Dallas pay a fine of \$15,000

The Tribunal expressed concern at the number of developments involved and that some of the complaints were significant.

The Tribunal accepted that the certifier realised the implications of her actions. The Tribunal also had regard to evidence that new and appropriate practices have been adopted by the certifier and that the conduct was confined to 2001 and 2002.

In making these orders, the Tribunal indicated that the fine imposed was appropriate and proportional and was a signal to the regulated group. The Tribunal confirmed that in making the orders the interests of the public are paramount, and that it was satisfied the consent orders were in the public interest.

## Department decisions

Examples of complaints recently determined by the Department include:

### Construction certificate and development consent conditions

**Allegation:** That the construction certificate issued by the accredited certifier did not comply with development consent conditions.

**Details:** The stormwater drainage plans referenced in the construction certificate determination did not comply with the development consent conditions relevant to the design of the stormwater drainage and on-site detention system. The development consent also required that the design be submitted and approved by Council prior to the issue of the construction certificate.

**Decision:** Whilst certifying authorities can take steps to satisfy themselves as to matters relating to stormwater drainage work under section 109O of the EP&A Act and clause 161 of the EP&A Regulation, the Department considered that the stormwater and drainage design did not comply with the development consent conditions and the issue of the construction certificate by the accredited certifier was in breach of clause 146(c) of the EP&A Regulation. The Department determined that there was a reasonable likelihood that the accredited certifier would be found guilty by the ADT of unsatisfactory professional conduct (but not professional misconduct), and in the circumstances, issued a reprimand to the certifier.

### Issue of subdivision certificate where not authorised

**Allegation:** That the accredited certifier issued a subdivision certificate when not authorised to do so under an environmental planning instrument.

**Details:** The accredited certifier, who was accredited under the BSAP accreditation scheme, issued a subdivision certificate for the creation of separate allotments certifying that the provisions of section 109J of the EP&A Act had been satisfied in relation to a proposed subdivision. The council's LEP did not identify the subdivision as being of a kind for which an accredited certifier may be a certifying authority. In addition, the BSAP Accreditation Scheme does not permit the issue of a subdivision certificate by any person accredited under it.

**Decision:** The Department considered that the accredited certifier was not authorised to issue the subdivision certificate under section 109D of the EP&A Act and that the accredited certifier had acted outside the limitations of accreditation under the BSAP Accreditation Scheme. The Department determined that there was a reasonable likelihood that the accredited certifier would be found guilty by the ADT of unsatisfactory professional conduct (but not professional misconduct) and, in the circumstances, issued a reprimand to the certifier.

### Issue of construction certificate contrary to development consent condition

**Allegation:** That the accredited certifier issued a construction certificate before a relevant development consent condition was satisfied.

**Details:** The development consent condition required the extinguishment of a drainage easement and the creation of a new easement to drain water prior to the issue of a construction certificate. Documents relevant to the creation of the easement were required to be registered with the Land Titles Office prior to the issue of a construction certificate. The information provided to the Department showed that the development consent condition had been discussed with a Council officer and that the accredited certifier issued a construction certificate prior to the registration of an easement to drain water. Some time after the construction certificate was issued, a modification to the development consent was granted by the Council deleting the condition.

**Decision:** The Department found that the accredited certifier issued a construction certificate prior to the creation of an easement to drain water that was contrary to the development consent condition and in breach of clause 146(c) of the EP&A Regulation. The Department 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) and, in the circumstances, issued a caution to the certifier.

### Issue of complying development certificate in breach of the EP&A Act

**Allegation:** That the accredited certifier issued a CDC for building works that had already commenced and were almost completed and where the issue of the CDC in respect of the property was not permissible under the Council's LEP because the property was located in a heritage conservation area.

**Details:** The accredited certifier relied on advice from an architect that building works had not commenced and that the premises were not located in a heritage conservation area. However, the information provided to the Department showed that the CDC was issued after building works had commenced and that the CDC was issued in respect of a property located in a heritage conservation area, contrary to the Council's LEP. Land and Environment Court Orders given in relation to this development as a result of these events required demolition and restoration works to the building and declared the CDC void.

**Decision:** The Department found that the accredited certifier issued a CDC after building works had commenced and for development which did not constitute complying development within the meaning of the LEP, which is contrary to sections 85 and 85A of the EP&A Act. The Department 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) and, in the circumstances, issued a reprimand to the certifier.

# PRACTICE ADVICE AND REMINDERS

## Certifying swimming pools and spas

A number of recent incidents involving swimming pools and spa pools have come to the attention of the Department. Subsequent enquiries, made with a number of certifying authorities (local councils and accredited private certifiers), have revealed that while the provisions of the *Swimming Pools Act 1992* and *Swimming Pools Regulation 1998* are relatively well known, the requirements of the BCA applicable to swimming pools and spas are less well known.

The Department is preparing a Practice Note to advise and inform Councils, certifying authorities, industry, relevant State agencies and the community of the BCA requirements for swimming pools and spa pools. The Practice Note will be released in the near future.

In the meantime, if you have any enquiries relating to the requirements of the BCA, including the NSW Appendices applicable to swimming pools and spa pools, please call the Department's BCA Advisory Service on (02) 9228 6529.

## Addressing complaints on developments

The BPB receives a number of complaints each year from persons who neighbour developments currently under construction. A number of those complaints concern the perceived failure of the PCA to respond effectively to complaints made by the neighbour to the PCA about breaches of development consent. In determining complaints of this nature, the BPB has significant regard to the records of the accredited certifier and the complainant in relation to that complaint.

Development applications submitted to Councils and other consent authorities are often subject to significant public consultation during the assessment process. Public comment may have influenced the final approved design of the development and conditions imposed on the development consent. Complying development certificates are also the subject of prescribed conditions requiring strict adherence to protect the interests of the community. Consequently, neighbours are often extremely aware of the terms of a development consent and whether construction is proceeding in accordance with those terms.

Under clauses 98A and 103 of the EP&A Regulation, PCAs are required to erect and maintain a sign on the development site identifying them as the PCA for the development and provide notice to the local council of their appointment as the PCA. The sign and notice must contain the telephone number of the PCA for the work.

The main purpose of these requirements is to enable Councils and community members to contact the PCA where breaches of development consent are observed. Accredited certifiers appointed as PCAs have power under section 109L of the EP&A Act to issue notices on builders and land owners to direct them with respect to that development, including directions to comply with the development consent and to demolish unauthorised building work.

When an accredited certifier who is appointed as the PCA receives a complaint from a neighbour concerning a development under construction, there is an expectation that they will return calls promptly, investigate the complaint expeditiously, determine what if any action is appropriate, and advise the complainant of the intended action/outcome within a reasonable timeframe. It may also be advisable, depending on the nature of the complaint, to notify the local council of the intended action/outcome of such an investigation so that the Council does not unnecessarily expend resources on a concurrent investigation of the matter. Of course, where an accredited certifier issues a notice under section 109L of the EP&A Act, they are required to send a copy of the notice to the local council, consent authority and owner of the land within 2 working days of the service of the notice.

Early intervention by certifiers when complaints are received may prevent the escalation of disputes between builders/developers and neighbours regarding compliance issues. It also reduces the likelihood of developments proceeding to a point where significant costs are incurred by the developer to rectify unauthorised work.

The BPB is aware that a number of PCAs address complaints through specifically articulated complaint policies. The BPB is also aware that many PCA fee proposals now incorporate the costs associated with resolving community complaints, including onsite meetings and additional inspections to monitor the site for compliance with the conditions of consent, in particular at each critical stage inspection.

It is recommended that accredited certifiers establish written procedures for investigating complaints and that the following records (as a minimum) be maintained in relation to complaints:

- the nature and details of the complaint
- the date, or when the certifier becomes aware, of the complaint and the name of the person making the complaint
- contact details of those involved in the development to help sort out the problem quickly
- a diary containing details of all contacts made, commitments given, and action taken
- copies of all letters/faxes/emails received and sent
- copies of any notices issued

## Missed critical stage inspections – notifying the accreditation body

Certifiers and Councils appointed as PCAs have an obligation under sections 81A(2)(b1)(ii) and 86(1)(a1)(ii) of the EP&A Act to notify the person having the benefit of the development consent or CDC of any critical stage inspections and other inspections that are to be carried out on the building work that is approved by the consent or CDC. These provisions are intended to ensure builders and developers are aware of the need to inform the certifier under clause 163 of the EP&A Regulation when the building work has reached the stage that requires the PCA to attend for an inspection.

In Issue Three, advice on recording unavoidably missed mandatory critical stage inspections was provided to certifying authorities. Certifiers are reminded of their responsibility to send a copy of the record of a missed inspection made under clause 162C(3) of the EP&A Regulation to their accreditation body, as well as to the person who appointed them. The Department has received a number of notices of missed inspections from certifiers accredited under the BSAP Accreditation Scheme. These records are being considered with a view to developing further advice for certifiers and best practice examples.

The BPB has also received a number of inquiries from Councils about the steps Council needs to take when an inspection is unavoidably missed. Council must also record the matters set out in clause 162(3) of the EP&A Regulation and forward a copy to the person who appointed them (clause 162(5)). However, Council is not under any duty to forward these records to the Department or to the BPB. Council should place the record on its files.

## Pre-conditions to the issue of an occupation certificate

Section 109H(1B) of the EP&A Act provides:

*An occupation certificate must not be issued unless any preconditions to the issue of the certificate that are specified in the development consent or complying development certificate have been met.*

### *What sorts of conditions attract the operation of section 109H(1B)?*

This provision does not require that every condition attaching to a development consent be complied with before an occupation certificate is able to be issued. The Department is of the view that to qualify as a precondition, a condition would need to be expressed in terms similar to those of clause 152(5) of the EPA Regulation, which provides:

*The certifying authority must not issue an occupation certificate for the building unless it has taken into consideration any final fire safety report for the building that has been furnished to it within the 7-day period.*

### *Does section 109H(1B) apply to all development consents and CDCs?*

Section 109H(1B) was inserted into the EP&A Act by the *Environmental Planning and Assessment (Quality of Construction) Act 2003*. The section commenced operation on 1 March 2004.

The Savings and Transitional provisions of the EP&A Act provide:

*Section 109H(1B), as inserted by the 2003 amending Act, does not apply to any building work that commenced before that amendment.*

Accordingly, section 109H(1B) does not apply to the determination of an application for an occupation certificate where building work commenced before 1 March 2004.

## Retrospective construction certificates

The Department recently received an inquiry from a law firm about the operation of section 109F(1A) of the EP&A Act. This new subsection commenced on 3 March 2006 and provides:

*A construction certificate has no effect if it is issued after the building work or subdivision work to which it relates is physically commenced on the land to which the relevant development consent applies.*

The Savings and Transitional provisions of the EP&A Act provide:

*Section 109F(1A) does not apply to a construction certificate issued before the commencement of that subsection or in relation to building work or subdivision work that was physically commenced on the land to which the relevant development consent applies before the commencement of that subsection.*

Section 109F(1A) has potentially far reaching effects, particularly in respect of subsequent applications for an occupation certificate.

Sections 109H(1C)(b) (relating to the issue of interim occupation certificates) and (1)(b) (relating to the issue of final occupation certificates) require the certifying authority to be satisfied that a construction certificate has been issued with respect to the plans and specifications for the building before an occupation certificate may be issued.

Without an occupation certificate, a person may commit an offence under section 109M of the EP&A Act if they commence to occupy or use any part of a new building.

In addition, clauses 6 (relating to strata units bought "off the plan") and 7 (relating to "land and house" packages") of the Conveyancing (Sale of Land) Regulation 2005, imply into a contract for the sale of land (subject to certain exceptions):

- a term that the vendor must serve a copy of an occupation certificate on the purchaser not less than 14 days prior to settlement, and
- a term that the purchaser does not have to complete the purchase earlier than 14 days after service of the occupation certificate.

Having regard to the problems that may be encountered if work commences prior to the issue of a construction certificate, it is strongly suggested that certifiers ensure their clients, and any building contractor who may be engaged, are made aware of the effect of section 109F(1A).

## Workplace safety

A number of recent incidents at building sites throughout Australia provide a timely reminder of the importance of workplace safety. According to figures released by WorkCover NSW, in 2004/5 there were in excess of 5700 injuries and 14 fatalities in the construction industry.

Certifiers are encouraged to review their current work practices to ensure they meet or exceed OH&S requirements. The NSW WorkCover Website ([www.workcover.nsw.gov.au](http://www.workcover.nsw.gov.au)) is a good source of information about workplace requirements and obligations.



Concrete samples being prepared for strength and serviceability testing.

# NEWS IN BRIEF

## Australasian Building Certification Forum

The BPB recently attended the Second Australasian Building Certification Forum, hosted by the Queensland Building Services Authority (BSA). The Forum was pioneered by the BPB and is scheduled to continue with the next meeting proposed in Victoria.

The Forum is a meeting of government agencies, from all States and Territories of Australia and from New Zealand, involved in the accreditation of building and subdivision certifiers. The aim of the Forum is to promote commonality between agencies and jurisdictions and to develop best practice procedures in accreditation and certification.

Most agencies and certifying authorities face similar issues in relation to such matters as the availability of suitably qualified people, professional indemnity insurance, conflicts of interest and pecuniary interest, continuing professional development and compliance. Forum participants made an undertaking to work collectively on these issues.

## OH&S Extension – Green Card Acceptance

Readers would be aware that the old 'Green Card' required for all persons entering construction sites expired earlier this year, replaced by WorkCover Construction Induction Certificate. WorkCover has recently advised that until 1 September 2006, employers, unions and associations can accept existing 'green cards'.

**From Saturday 2 September 2006** only a current WorkCover Construction Induction Certificate will be accepted. This certificate must be obtained from a WorkCover accredited trainer (provisions for automatic conversion have expired).

For further information, please call WorkCover on 131050 or visit [www.workcover.nsw.gov.au](http://www.workcover.nsw.gov.au)

## Construction and Property Services Industry Skills Council (CPSISC)

The CPSISC represents the workforce and development needs of the construction and property services industry nationally. Their mission is to serve these industries by identifying and meeting their training, skill and workforce development needs.

The CPSISC's annual conference was held recently in Sydney. The conference was attended by a range of stakeholders from the property services and construction industry and focused on the future skills needs of these industries. Participants had the opportunity to listen to a variety of presentations on the future directions and innovations in these industries. On the second day of the conference, participants were split into industry streams for more focused discussions. Outcomes included:

- rethinking career pathways in order to attract and retain workers
- commitment to engage in the Council of Australian Governments (COAG) current licensing review process to ensure occupational licensing is consistent and transferable across jurisdictions
- better understanding of the skills benchmarks for various roles and the training requirements

More information about the conference, including copies of the keynote addresses, is available on the CPSISC website [www.cpsisc.com.au](http://www.cpsisc.com.au)

## Update on problems in the Japanese construction industry

Since the last issue, eight persons involved in the falsification of data in the construction industry in Japan have been arrested as a result of ongoing investigations. Police are continuing to investigate breaches of the Building Standards Law. There appears to have been a plethora of 'gaps' in processes and policies that allowed the data falsification to go undetected for so long.

The BPB will continue to monitor developments in Japan to determine what implications, if any, there are for the Australian context.

# BPBB

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## Subscribing to the BPBulletin

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

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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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