

in this issue

Page 1

Results of exhibition of draft regulation and accreditation scheme

Page 3

Recent changes affecting certifiers and councils

Page 4

Focus on the BPB - Accreditation Unit

Page 5

Recent complaints' findings

Page 8

Practice advice and reminders

Page 17

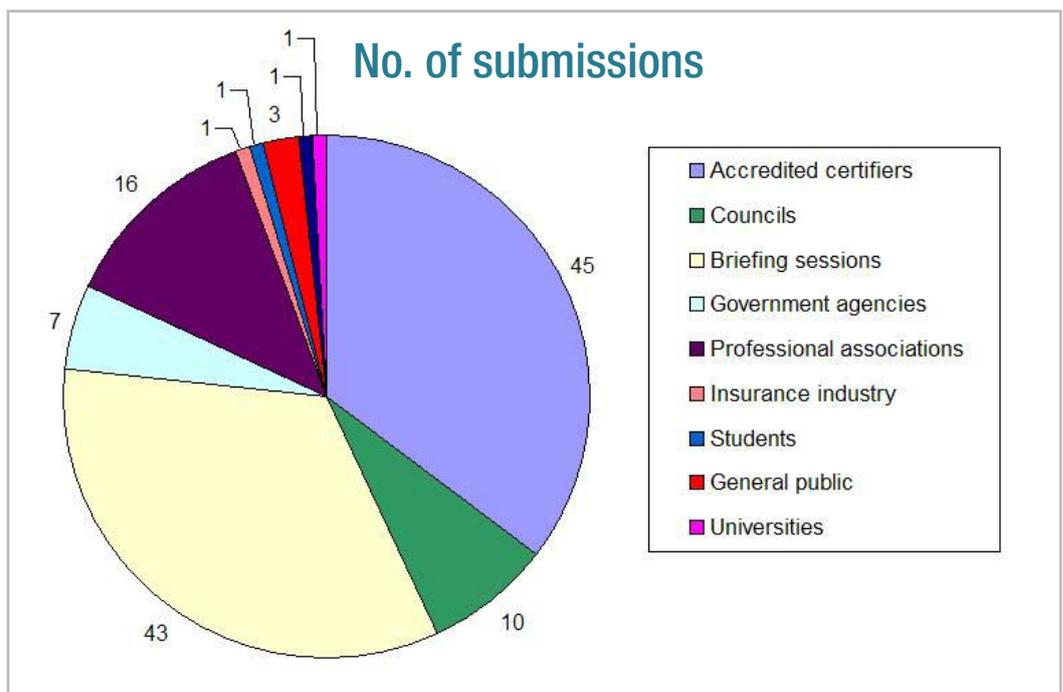
News in brief

RESULTS OF EXHIBITION OF DRAFT REGULATION AND ACCREDITATION SCHEME

The BPB recently exhibited the draft Building Professionals Regulation 2006 and draft accreditation scheme to be made under the *Building Professionals Act 2005* (BP Act). The documents were on exhibition until 25 August 2006.

During the exhibition period, eight briefing sessions were held in various locations throughout NSW. The sessions provided participants with information about the proposals under the draft Regulation and accreditation scheme and encouraged them to identify issues and possible solutions to those issues. The sessions each ran for 3-4 hours and were attended by 280 people including accredited certifiers, local and state government officers and representatives of relevant professional associations.

The BPB received 128 submissions on the draft Regulation and accreditation scheme. The following chart illustrates the proportion of submissions received from the various stakeholder groups.



On a preliminary review, the major issues raised in submissions about the proposals relate to:

- accreditation application fees
- conflicts of interest provisions
- relocation of certain performance criteria to the accreditation statements to ensure certifiers cover particular criteria to the required standard, eg. in relation to the Building Code of Australia (BCA)
- expression of qualifications in the scheme
- insurance
- ensuring greater certainty in the accreditation process
- expansion of categories of accreditation
- training and experience of certifiers, and
- corporate and organisational certification



Participants at BPB briefing session in Sydney

The BPB is currently reviewing all of the submissions received prior to finalising the Regulation and accreditation scheme.

Detailed accounts of responses to all issues raised in the submissions will be available in the next few months.

The BPB thanks all of those who attended a briefing session, and/or provided a submission, for their interest and input into the process.

The draft regulation, regulatory impact statement and draft scheme are available at www.bpb.nsw.gov.au.

RECENT CHANGES AFFECTING CERTIFIERS AND COUNCILS

BASIX for Alterations and Additions

The Building Sustainability Index (BASIX) for Alterations and Additions scheme **became mandatory, across NSW, on 1 October 2006.**

The BASIX Alterations and Additions tool is now available on the BASIX website www.basix.nsw.gov.au.

From 1 October 2006, BASIX Alterations and Additions applies to projects that are valued at or more than \$100,000 as well as large swimming pools. From 1 July 2007, BASIX Alterations and Additions will apply to projects valued at or more than \$50,000. Minor developments, including garages, storerooms, car ports, gazebos, verandahs and awnings, will be exempt from BASIX. When a proponent of an alteration and addition voluntarily lodges a BASIX Certificate, that application will be captured by the requirements of the BASIX scheme.

BASIX Alterations & Additions:

- operates on-line, as part of the existing BASIX website (www.basix.nsw.gov.au),
- sets simple, specific requirements, based on the proposed work, and
- only applies to the sections of the home that are being renovated

The scheme differs from the *BASIX for new homes* scheme in that there are no set reduction targets for Energy and Water. The requirements, which are sensitive to climate, have some flexibility and only apply to the section of the home that is being renovated.

For more information on BASIX, visit www.basix.nsw.gov.au, email basix@planning.nsw.gov.au or telephone 1300 650 908.

New exempt and complying development provisions

The new exempt development and complying development provisions of the Blacktown Local Environmental Plan 1988 (Amendment No. 214) were proclaimed in the NSW Government Gazette **on 18 August 2006.**

The new provisions can be accessed at www.legislation.nsw.gov.au (Browse A-Z In Force/Environmental Planning Instruments in Force/B/Blacktown Local Environmental Plan 1988/Clauses 9A and 9B).

Ministerial Guidelines

The Minister for Planning has approved amendments to the guidelines established under clause 198 of the Environmental Planning and Assessment Regulation 2000 (EP&A Regulation). The Ministerial Guidelines provide guidance to the BPB in administering the Building Surveyors and Allied Professions Accreditation Scheme (BSAP Scheme). The amended guidelines **took effect from 21 August 2006.**

The amendments to the guidelines relate to:

- enabling the direct reporting of complaint investigations to the State Assessment Committee (SAC) and the SAC's recommendation to the Minister's appointee for determination
- enabling complaint investigation reports to include recommendations for consideration by the SAC
- removing the right for complainants to seek a review on complaint decisions (consistent with new processes to be introduced when the BP Act commences)
- specifying the special circumstances referred to in the BSAP Scheme as to when a change of Principal Certifying Authority (PCA) is appropriate, and
- amending the quorum for SAC meetings to 3 members

To access the amended guidelines, please visit www.bpb.nsw.gov.au/certifiers/board

FOCUS ON THE BPB – ACCREDITATION 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 this article, the functions of the Accreditation Unit are explained.

The accreditation process

At present, the Accreditation Unit considers applications for accreditation and re-accreditation under the BSAP Scheme and applications for the replacement of a PCA under the *Environmental Planning and Assessment Act 1979* (EP&A Act) and EP&A Regulation.

Applications for accreditation and re-accreditation made under the BSAP accreditation scheme are assessed by the unit and a report made to the SAC. The SAC usually meets once a month and undertakes interviews of most new accreditation applicants. The SAC comprises representatives of the Local Government and Shires Associations of NSW, Australian Institute of Building Surveyors, the Department and universities. The Accreditation Unit provides administrative assessment of the applications and technical support to the SAC during the interview process. The SAC assesses the applications and makes recommendations to the Director of the BPB who makes the final determination.

The BSAP Scheme includes provisions for the review of decisions made in respect of applications for accreditation. The grounds for seeking a review are outlined in the Scheme.

Application forms for seeking accreditation or re-accreditation under the BSAP Scheme are available at www.bpb.nsw.gov.au/certifiers/board.shtml. Applicants are encouraged to read the BSAP Scheme before completing an application and to include all details as required in the form to avoid delays in processing the application.

The Accreditation Unit also considers applications for the replacement of a PCA under the EP&A Act and EP&A Regulation where the person is accredited under the BSAP Scheme. These application forms are available at www.bpb.nsw.gov.au/public/replace.shtml.

Transitioning to the BP Act

When the BP Act commences, a new accreditation process will be introduced. The BPB is currently working with the other existing accreditation bodies (Engineers Australia, the Planning Institute of Australia and the Professional Surveyors' Occupational Association) to ensure a smooth transition of existing certifiers into the new accreditation scheme. Before the new scheme commences, all certifiers will be notified of the categories of accreditation into which they will be converted. The conversion will enable certifiers to continue to carry out the work they are currently accredited to do.

A new process for the replacement of a PCA will also be introduced when the BP Act commences – section 109EA of the EP&A Act will be amended. For further information on this change and on the provisions of the BP Act, see the BPB's publication *Building Professionals Act 2005: a guide*, available at www.bpb.nsw.gov.au/publication.

RECENT COMPLAINTS' FINDINGS

Disciplinary proceedings in the Administrative Decisions Tribunal (ADT)

In 2005, the Department commenced proceedings in the ADT against accredited certifier Mr Ivan Boule in respect of a complaint lodged by North Sydney Council. These proceedings have recently been finalised and are detailed below.

The complaint related to the issue of a construction certificate for alterations and additions to an existing dwelling that was inconsistent with the relevant development consent. The inconsistencies found to have been present included:

- relocation of skylights and the addition of another skylight
- the reduced levels (RLs) indicated on the development consent plans for the ridgeline deleted from the construction certificate plans
- replacement of the roof with new material
- addition of a pergola to the rear
- increase in size of the roof storage area with reductions in sizes of fenestrations
- changes in sizes of fenestrations off the living area from fixed sidelight windows with French doors to full bifold doors
- a new timber decking and the addition of a porch
- new loft storage areas in both dwellings with incorporation of stairs and reconfiguration of adjoining ensuites

The construction certificate was also found to not comply with Part 3.7.1 of the BCA in relation to the location of skylights.

The Tribunal noted that in relation to the question of whether a construction certificate is not inconsistent with the development consent, the Department's practice notes *When is a section 96 modification required?* (1999) and *Construction certificates for building work* (1999), provide appropriate guidance.

The Tribunal also noted that the determination date of the development consent did not appear on the construction certificate determination and a business name, rather than the accredited certifier's name, had been placed on the construction certificate as being the certifying authority.

The Tribunal found the certifier guilty of unsatisfactory professional conduct and, on 27 June 2006, issued him with a reprimand and ordered that he pay a fine of \$2,000.

Comment

Certifying authorities need to pay careful attention to the requirements of the development consent when issuing a construction certificate or carrying out inspections. Where any inconsistencies are noted, a determination needs to be made as to whether an application under section 96 of the EP&A Act is required.

The Department is of the view that the types of inconsistencies that arose in this case required a modification to the development consent before the construction certificate could be issued.

To obtain a copy of the above practice notes, please contact the BPB at bpb@bpb.nsw.gov.au.

Department disciplinary decisions

Examples of complaints recently determined by the Department include:

Issue of construction certificate inconsistent with development consent

Allegation: That the accredited certifier issued a construction certificate, allowing the demolition and reconstruction of a building, which was inconsistent with the terms of the development consent.

Details: The signed construction certificate was released by a member of the accredited certifier's staff without the knowledge or approval of the accredited certifier. The construction certificate that was released was inconsistent with the development consent as the construction certificate drawings did not depict the external walls and the roof areas as being retained.

The Department found that the procedures administered by the accredited certifier, where a certificate was signed before all required matters were addressed and required documentation attached, constituted actions that fell short of the standard of diligence that a member of the public is entitled to expect of a reasonably competent accredited certifier.

Decision: 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 accredited certifier.

Issue of a complying development certificate (CDC) for pool contrary to council's Development Control Plan (DCP)

Allegation: That the accredited certifier issued a CDC for the construction of an in-ground swimming pool that was not in accordance with the council's DCP requirements. It was also alleged that the CDC did not comply with the council's Interim Development Order (IDO) and DCP in relation to the siting of the pool filter and pump unit.

Details: The information collected during the investigation into the complaint did not support the allegation made by the complainant that the accredited certifier issued a CDC (for the construction of the pool) that did not comply with the criteria set for the complying development.

However, the Department found that the certifier issued the CDC subject to conditions that did not comply with the requirements of Council's IDO and DCP. Section 85(1)(a) of the EP&A Act requires CDCs to be issued subject to the conditions contained in the relevant DCP.

Decision: 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 the accredited certifier with a reprimand and requested that the certifier report on his practices in relation to ensuring that all DCP Guidelines are complied with prior to the issue of a Part 4A or complying development certificate.

Certificates not forwarded to council within 7 days and appointment of PCA prior to issue of construction certificate

Allegation: That the accredited certifier issued construction certificates and occupation certificates for a number of different developments and did not forward copies of the certificates to the council within 7 days after determination.

Details: Copies of the construction certificates and occupation certificates were not forwarded to the council within 7 days after determination in breach of clauses 79D(2) and 79L(2) of the Environmental Planning and Assessment Regulation 1994. The notices of commencement of work and appointment of the PCA were dated prior to the issue of the relevant construction certificate.

Decision: 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 under section 109Z(4) of the EP&A Act.



Accredited certifiers while undertaking a site inspection must ensure that fencing continues to be compliant

Responsibilities of the PCA

Allegation: The complaint related to a number of allegations concerning the issue of CDC and the role undertaken by the PCA.

Details: A number of allegations were made against the accredited certifier that were found to be unsubstantiated by the Department. These included allegations of failing to notify the land owner of critical stage inspections and failing to carry out critical stage inspections, as such inspections were not a mandatory requirement under the EP&A Act at that time.

The Department found that a land owner's consent form was altered by a person working in the accredited certifier's company without the knowledge and consent of the owner. The accredited certifier failed to ensure that adequate systems were in place to check and return an incomplete form to the owner. Amendments to the form should have been approved by the land owner before the notification was given to council.

The CDC issued by the accredited certifier incorrectly described the development as the erection of an awning ancillary to the use of an existing dwelling (class 10a), whereas the plans approved as part of the CDC depicted an addition to the existing dwelling (class 1a).

Decision: 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 and directed that he report on his practice under section 109Z(4) of the EP&A Act. The accredited certifier was directed to report on his practice in respect of:

- the systems he has in place to ensure that forms are checked and returned to the owner if incomplete,
- the process he undertakes when incomplete notice of appointment of PCA forms are lodged, and
- his obligations as the PCA when he becomes aware that works have commenced without notification of inspections as per the PCA agreement

PRACTICE ADVICE AND REMINDERS

Does an occupation certificate confirm compliance with the development consent?

Concern has been raised with the BPB that councils and the broader community may be utilising occupation certificates to confirm that all conditions of development consent have been complied with, so as, for example, to enable a council to then refund damage deposits.

An occupation certificate does not certify that all works have been carried out in accordance with the requirements of the development consent. An occupation certificate authorises the occupation and use of a building and can be issued once the PCA is satisfied of certain matters as contained in the EP&A Act and EP&A Regulation. In the case of a final occupation certificate for the occupation or use of a new building, those matters are:

- that pre-conditions to the issue of the certificate that are specified in a development consent or CDC have been met
- that a development consent or CDC is in force with respect to the building
- in the case of a building subject to a development consent (and not a CDC), that a construction certificate has been issued
- that the building is suitable for use in accordance with its classification under the BCA, and
- that such other matters required under the EP&A Regulation to be complied with before an occupation certificate may be issued, have been complied with

Further advice on occupation certificates is available in Department of Planning Circular PS05-001, *Occupation certificates and conditions of development consent*, which provides guidance for councils about setting pre-conditions to the issue of an occupation certificate and the matters that may be appropriate to address or finalise after an occupation certificate is issued (www.planning.nsw.gov.au/planningsystem/practicenotes.asp).

As the issue of an occupation certificate, either interim or final, is subject to any preconditions specified in the development consent or CDC, it is important that councils carefully assess which conditions of development consent are required to be complied with prior to the issue of an occupation certificate. Consent authorities should check any standard conditions of consent that are routinely used to ensure they do not unreasonably prevent occupation and use of new buildings and decide, according to individual circumstances, which conditions might reasonably be satisfied after an occupation certificate is issued.

The Department of Planning recently issued a letter to all councils in NSW, accredited certifiers and other stakeholders to remind them of the role and scope of conditions of development consent and to encourage consent authorities to ensure that all conditions of consent are consistent with the powers under the EP&A Act.

It would be prudent for accredited certifiers and councils acting as PCAs to advise the applicant for the occupation certificate of any conditions that are outstanding and which are required to be complied with after the issue of the occupation certificate, such as those requiring ongoing maintenance, inspections or adherence to performance measures. Such conditions are outside the domain of the occupation certificate. However, non-compliance with such conditions could result in orders being issued by the council under section 121B of the EP&A Act to ensure they are satisfied.

Missed inspections and occupation certificates

Can an occupation certificate be issued if a critical stage inspection is missed in circumstances which the PCA considered to be avoidable, even if the work is satisfactory?

In the Department's view, the answer is no.

Section 109E(3)(d) of the EP&A Act provides:

- (3) *A principal certifying authority for building work or subdivision work to be carried out on a site is required to be satisfied:*
- (d) *that building work or subdivision work on the site has been inspected by the principal certifying authority or another certifying authority on such occasions (if any) as are prescribed by the regulations and on such other occasions as may be required by the principal certifying authority, before the principal certifying authority issues an occupation certificate or subdivision certificate for the building or work.*

Clause 162A of the EP&A Regulation sets out the prescribed occasions on which building work is required to be inspected (critical stage inspections).

Clause 162C(2) of the EP&A Regulation sets out the circumstances in which a critical stage inspection, other than a final inspection, is not prescribed for the purposes of section 109E(3)(d). The circumstances set out in this clause also operate to negate the need to carry out an inspection that is required by the PCA to be carried out.

Clause 162C(2) provides:

- (2) *The circumstances are:*
- (a) *the inspection was missed because of circumstances that the principal certifying authority considers were unavoidable, and*
- (b) *the principal certifying authority is satisfied that the work that would have been the subject of the missed inspection was satisfactory, and*
- (c) *the principal certifying authority, as soon as practicable after becoming aware of the circumstances that caused the inspection to be missed, makes a record in accordance with subclause (3).*

Clause 162C(3) sets out the requirements referred to in clause 162C(2)(c) as to the record that must be made in relation to an unavoidably missed inspection. This clause provides:

- (3) *The record of a missed inspection must include the following:*
- (a) *a description of the development to which the record relates and of the class of the building concerned,*
- (b) *the address and land title particulars (such as the Lot and DP numbers) of the property concerned,*
- (c) *the registered number of the development consent and the construction certificate or of the complying development certificate,*
- (d) *the name and accreditation number of the principal certifying authority,*
- (e) *the name, address and telephone number of the principal contractor or owner builder and, if that person is required to be the holder of a licence or permit, the number of that licence or permit,*
- (f) *particulars of the inspection that was missed and of the circumstances that the principal certifying authority considers were unavoidable that caused it to be missed,*
- (g) *a statement that the principal certifying authority is satisfied that the work that would have been the subject of the missed inspection was satisfactory,*
- (h) *the documentary evidence that was relied on to satisfy the principal certifying authority that the work that would have been the subject of the missed inspection was satisfactory, including (but not limited to) documentary evidence of a kind referred to in Part A2, clause A2.2, of the Building Code of Australia .*

Unless all of the criteria in clause 162C(2) and (3) are satisfied, including the requirement that the inspection was missed because of circumstances which the PCA considers to be unavoidable, the inspection remains a prescribed inspection for the purposes of section 109E(3)(d) of the EP&A Act. Section 109E(3)(d) prevents a PCA from issuing an occupation certificate unless all prescribed inspections have been carried out.

What would constitute an unavoidable circumstance for a missed inspection?

The term “unavoidable circumstance” is not defined in the EP&A Act or EP&A Regulation and must be determined by the circumstances of the case. It is the Department’s view that the term should not be interpreted widely and would not cover situations of inadvertence, inconvenience or impracticality. The purpose of critical stage inspections is to protect the public by ensuring that work proceeds in a satisfactory manner by being inspected at appropriate stages.

Under clause 162C(5) of the EP&A Regulation, the PCA must send a copy of the record of a missed inspection to his/her accreditation body. A review of the records provided to the Department for missed inspections reveals a range of reasons given as to why critical stage inspections have been missed, including:

- belief by the PCA that an engineer (who is not an accredited certifier) could do a critical stage inspection
- belief by the PCA that an inspection had been done
- the builder being unaware of the inspection requirements
- insufficient notice for an inspection being provided to the PCA
- unavailability of the PCA eg. taking holidays

These circumstances essentially arise from poor communication between the builder, owner and the PCA and a misunderstanding by the PCA about who must carry out the inspections. It is apparent that many PCAs are not adequately informing clients with respect to what a critical stage inspection is, who can perform them and when they are required.

It is questionable as to whether a missed inspection resulting from any of the above situations constitutes an “unavoidable circumstance”. The reasons offered reflect situations that may have been avoidable with the implementation of good practices and better communication between the PCA, clients and builders.

The Department considers that the types of circumstances that are unavoidable would include occasions in which the builder has to act quickly where there is a risk to public safety or property or where the PCA is unexpectedly not available through serious illness or misadventure. There would also need to be a compelling reason as to why the inspection could not have been postponed to a later date.

It is imperative that PCAs advise the owner/builder/developer in writing at the time of their appointment of the possible consequences of proceeding with work without the required inspections.

Enforcement powers of council when not appointed as the PCA

The BPB receives regular enquiries about the role and responsibilities of councils in enforcing requirements of a development consent when an accredited certifier (not the council) has been appointed as the PCA for the development.

Councils often receive complaints about developments for which an accredited certifier has been appointed as the PCA, particularly in relation to the non-compliance of that development with the development consent.

Whilst the EP&A Act provides clear powers to councils to act in such circumstances, many councils choose, at least initially, to refer such complaints to the PCA. This response may be entirely appropriate depending on the nature and extent of any non-compliance. While the Department is aware that some councils take enforcement actions irrespective of an accredited certifier’s involvement as PCA, others appear reluctant to take any action where an accredited certifier is involved.

The compliance functions of a private PCA and council are both overlapping and complimentary. The compliance powers of both are discretionary and there are no hard and fast rules about how and when either authority should act. The advice below is intended to provide guidance to councils and accredited certifiers when exercising these powers.

Councils' compliance powers

The main compliance power for councils is contained in section 121B of the EP&A Act. This section authorises a council to issue orders in specific circumstances to persons, requiring them to undertake, or to refrain from, certain actions.

A commonly issued order is order No.15, which requires a person to comply with the development consent.

Section 121H(1) of the EP&A Act provides that, in cases not involving an emergency, council must give to the person to whom it proposes to give an order, a notice setting out the proposed terms of the order and the proposed period for compliance. The notice must also indicate that the person may make representations as to why the order should not be given.

Significantly, section 121H(5) of the EP&A Act provides:

If a council proposes to give an order in relation to building work or subdivision work for which the council is not the principal certifying authority, the council must give the principal certifying authority notice of its intention to give the order.

This provision confirms that the council may take action in relation to a development where it has not been appointed as the PCA.

Sections 121I to 121N of the EP&A Act contain provisions dealing with the making of representations and the process involved in hearing, determining and communicating the decision about making orders.

A council may also impose a fine by the issue of a penalty notice for failure to comply with many of the orders given under section 121B of the EP&A Act.

Council has other powers by which it may be possible to effectively achieve compliance with certain conditions of consent including issuing, under the *Protection of the Environment Operations Act 1997 (POEO Act)*:

- clean-up or prevention notices in respect to pollution incidents
- noise control notices
- penalty notices

Action under the POEO Act may be appropriate if conditions of consent relating to sediment control or hours of work are being breached.

Any person, including a council and an accredited certifier or PCA, may also bring an action in the Land and Environment Court under section 123 EP&A Act for an order to remedy or restrain a breach of the EP&A Act.

Certifiers' compliance powers

Section 109L of the EP&A Act provides:

- (1) *An accredited certifier who is the principal certifying authority for any development may, by notice served on a person on whom an order under section 121B may be served, direct that person to do anything that the consent authority could require that person to do by means of such an order.*
- (2) *A notice under this section has the same effect as a notice referred to in section 121H (1), and the provisions of Division 2A of Part 6 have effect accordingly:*
 - (a) *subject to the accredited certifier being:*
 - (i) *present when representations are made under section 121I, and*
 - (ii) *entitled to make representations to the consent authority or nominated person to whom the representations under section 121I are made, and*
 - (iii) *entitled to have the representations made by the accredited certifier heard and considered under section 121J in the same way as the representations under section 121I are heard and considered, and*

- (b) *subject to such other modifications as the regulations may prescribe.*
- (3) *Within 2 working days after the date on which an accredited certifier serves a notice under this section, the accredited certifier must send copies of the notice:*
- (a) *to the council, and*
 - (b) *if the development is the subject of development consent given by a consent authority other than the council, to the consent authority, and*
 - (c) *if the person on whom the notice is served is not the owner of the land on which the development is being carried out, to the owner of the land.*

It is evident that the power of an accredited certifier PCA is limited to giving a notice which commences a process that needs to involve the council and which may result in the council issuing an order under section 121B of the EP&A Act.

Whilst the accredited certifier PCA cannot bind the council to exercise its discretion to issue an order, the issuing of a notice under section 109L has the effect of at least requiring a council to direct its mind to whether it should do so. In addition, under section 109L(2) an accredited certifier PCA is in a good position to influence the council's decision by being entitled to be present when representations are made and to make representations themselves.

Who should act and when?

Councils and accredited certifier PCAs may be called upon to exercise their compliance powers arising from a complaint that a development is not proceeding according to the development consent or resulting from the certifier's or council's own findings on inspections.

Because of the overlap of authority, accredited certifier PCAs and councils may be put in a difficult position if a complaint is lodged with both authorities.

In most cases it is preferable for complaints to be referred to the PCA in the first instance, as this is likely to be the person with the most association and familiarity with events occurring on site. The accredited certifier PCA may be able to effectively resolve the complaint without recourse to the issue of a section 109L notice. Issue Six of the Bulletin provided advice to certifiers in addressing complaints on developments.

Where urgent action is required or where a significant breach of the development consent, the EP&A Act or the PEOA is involved, however, it may be more appropriate for a complaint to be referred to the council because of its greater range of powers.

Irrespective of why a complaint has been made and who has made the complaint, councils and certifiers need to work together to resolve issues when they arise so as to achieve compliance with the development consent or CDC. Certifiers should take all necessary steps to achieve compliance in the first instance and councils need to give careful consideration to utilising their compliance powers.

Reliance on Part 4A or complying development certificates

Section 109P of the EP&A Act provides:

- (1) *A person who exercises functions under this Act in reliance on a Part 4A certificate or a complying development certificate is entitled to assume:*
- (a) *that the certificate has been duly issued, and*
 - (b) *that all conditions precedent to the issuing of the certificate have been duly complied with, and*
 - (c) *that all things that are stated in the certificate as existing or having been done do exist or have been done,*
- and is not liable for any loss or damage arising from any matter in respect of which the certificate has been issued.*
- (2) *This section does not apply to an accredited certifier in relation to any Part 4A certificate or complying development certificate that he or she has issued.*

Where a Part 4A certificate or CDC is issued in relation to an aspect of a development, the protection of section 109P is available and the PCA may assume that the certificate has been duly issued and that all things stated as being done in the certificate have been done.

PCAs should note that where they are acting in reliance on a Part 4A certificate or CDC, they are not liable for any loss or damage arising from a matter dealt with by the certificate.

In addition, any accredited certifier who issues a Part 4A certificate or CDC is required to have professional indemnity insurance under the EP&A Act. By contrast, a certificate issued by a non-accredited person (such as an installer's certificate or an engineer's certificate) is not a Part 4A certificate and does not attract the protection afforded by section 109P, nor the professional indemnity insurance required under the EP&A Act.

Fire protection and structural capacity of buildings

The EP&A Regulation places obligations on both the consent authority and the certifying authority to consider, amongst other things, the fire safety and structural capacity of buildings when determining applications in relation to an existing building.

Obligations on the consent authority

Clause 93 of the EP&A Regulation requires the consent authority, when considering a development application for a change of building use for an existing building (which does not involve the rebuilding, alteration, enlargement or extension of a building), to take into consideration whether the fire protection and structural capacity of the building will be appropriate to the building's proposed new use. The consent authority is also to be satisfied that the building complies or will, when completed, comply with the Category 1 fire safety provisions as are applicable to the building's proposed new use.

The obligation to comply with the Category 1 fire safety provisions may require building work to be carried out even though no such work is proposed in the development application.

Clause 94(1) of the EP&A Regulation requires the consent authority, when considering a development application for a development comprising the rebuilding, alteration, enlargement or extension of an existing building and where:

- (a) *the proposed building work, together with any other building work completed or authorised within the previous 3 years, represents more than half the total volume of the building, as it was before any such work was commenced, measured over its roof and external walls, or*
- (b) *the measures contained in the building are inadequate;*
 - (i) *to protect persons using the building, and to facilitate their egress from the building, in the event of a fire, or*
 - (ii) *to restrict the spread of fire from the building to other buildings nearby*

to take into consideration whether it would be appropriate to require the existing building to be brought into total or partial conformity with the BCA.

Clause 3 of the EP&A Regulation defines *fire protection and structural capacity of a building* as meaning:

- (a) *the structural strength and load capacity of the building, and*
- (b) *the measures to protect persons using the building, and to facilitate their egress from the building, in the event of fire, and*
- (c) *the measures to restrict the spread of fire from the building to other buildings nearby*

Under clause 3 of the EP&A Regulation, *Category 1 fire safety provisions* is defined to mean the following provisions of the BCA – namely EP1.3, EP 1.4, EP 1.6, EP 2.1, EP 2.2, and EP 3.2 in Volume One of that code and P2.3.2 in Volume Two of that code.

Clause 94 of the EP&A Regulation requires the consent authority to consider all performance requirements in the BCA, not just the fire safety considerations that are addressed pursuant to clause 93 of the EP&A Regulation.

The consent authority must consider whether the building should be upgraded totally with the BCA when assessing the development application and, if appropriate, impose conditions that specify that upgrading work that relates to the existing building is required. The certifying authority and PCA are required to ensure that these conditions of development consent are complied with as required prior to the issue of a construction or occupation certificate, respectively.

Obligations on the certifying authority

The certifying authority also has obligations under clause 143 of the EP&A Regulation to ensure that fire protection and structural capacity of the building is considered when issuing a construction certificate for building work under a development consent that authorises a change of building use, or building work that involves the alteration, enlargement or extension of an existing building in which no change of building use is proposed.

Advice on clause 143 was provided in Issue Five of the Bulletin. Similar provisions also exist in clauses 131 and 132 of the EP&A Regulation in relation to CDC applications.

The BPB proposes to issue a practice note on the fire protection and structural capacity of buildings to provide further guidance in relation to these provisions.

Long service payments requirements

Requirement to pay

Section 109F(1)(b) of the EP&A Act provides that a construction certificate must not be issued unless the certifying authority is satisfied that any long service payment levy payable under section 34 of the *Building and Construction Industry Long Service Payments Act 1986* (BCILSP Act) (or, where such a levy is payable by instalments, the first instalment of the levy) has been paid.

Similarly, section 85A(10A) of the EP&A Act provides that a CDC must not be provided to an applicant unless the levy, or the first instalment, has been paid.

How much is the levy?

The levy is based on the cost of erecting a building. The regulations to the BCILSP Act set the levy in respect of building work commencing after 1 January 2006 at 0.35%. The levy is payable in respect of building work costing \$25,000 or more.

A Levy Calculator is available on www.lspc.nsw.gov.au.

How is the cost of the building work determined?

Section 40 of the BCILSP Act provides that the certifying authority issuing the construction certificate or the CDC may determine the cost of erecting a building.

If no determination is made by the certifying authority, the levy is based on the contract price. If there is no contract price, the Building and Construction Industry Long Service Payments Corporation (the Corporation) will determine the cost.

If the Corporation is satisfied that the cost of the building, as determined by the certifying authority or based on the contract price, is not a genuine and accurate estimate of the cost of erecting a building, the Corporation may determine the cost.

In order to avoid the prospect of a further payment being required to be made as a result of a review by the Corporation, accredited certifiers should satisfy themselves that the levy is based on a realistic cost of construction. Accredited certifiers are reminded that clause 205(f)(iv) of the EP&A Regulation already requires them to keep a record of their estimate of the cost of each project for which they have issued a CDC or Part 4A certificate.

Who must pay the levy?

Section 37 of the BCILSP Act provides that the levy is payable by the person to whom the construction certificate or CDC is to be issued.

What proof of payment is required?

Payments of levies should be made to the Corporation or an authorised agent capable of collecting privately certified work.

Accredited certifiers should require the production of a receipt issued by the Corporation or an authorised agent in order to be satisfied that the levy has been paid.

Where completion of a Levy Payment Form is required when making a levy payment, it is to be completed in full. Incomplete forms will result in delays with issuing a receipt, which is necessary prior to the release of the relevant construction certificate or CDC.

Assistance

Further information about levies can be obtained by contacting the Corporation's HELPLINE on 13 14 41 or through its website www.lspc.nsw.gov.au.

Corporation officers may pay visits to accredited certifiers for the purpose of providing assistance and information about the levy system. The Corporation also has an ongoing compliance program which includes random checks being made of councils and accredited certifiers to ensure the correct levies are being paid.

Wording of statement on construction certificates

The Department has become aware that some accredited certifiers have not updated the wording of the statement that must be included on a construction certificate under clause 147 of the EP&A Regulation.

Clause 147(1)(e) provides that the construction certificate must contain:

- (e) *a statement to the effect that work completed in accordance with documentation accompanying the application for the certificate (with such modifications verified by the certifying authority as may be shown on that documentation) will comply with the requirements of this Regulation as are referred to in section 81A (5) of the Act.*

It is apparent that some certifiers are still using the statement referenced on the old Form 11 Construction Certificate, which stated:

"I certify that the work if completed in accordance with these plans and specifications will comply with the requirements of s 81A (5) of the Environmental Planning and Assessment Act 1979."

This difference in wording was one of the reasons the Land and Environment Court found a construction certificate to be invalid in *Austcorp No. 459 Pty Limited v Baulkham Hills Shire Council* [2002] NSWLEC 90.

Certifying authorities are reminded to ensure that construction certificates comply with the current legislation.

Insurance for the whole of the period of accreditation

Accredited certifiers may carry out the work of a certifying authority in relation to building work and subdivision work only if they are covered by the required insurance (section 109ZN of the EP&A Act). The required insurance must comply with clauses 207, 208, 209, 210, 214, 218 and 219 of the EP&A Regulation.

Clause 207(b) of the EP&A Regulation requires an accredited certifier to obtain insurance for the whole period during which he or she has been an accredited certifier.

An accredited certifier working as a **sole trader** and having only worked for himself/herself is required to obtain an individual insurance contract each year to cover the whole time period of his/her accreditation. That means the individual insurance contract taken out each year must have a retroactive date that goes back to the start of the certifier's first accreditation date.

An accredited certifier **employed by a company** and covered by a company insurance contract that complies with the EP&A Regulation will be covered for the certifier's statutory liability for work carried out while employed by the company. However, the company contract will not cover any previous period when the accredited certifier may have been covered by an individual contract.

An accredited certifier who has previously worked for himself/herself and who was covered by an individual insurance contract and who then commences work for a company as a certifying authority, is required to continue to obtain his/her own annual individual insurance for the period of his/her accreditation that occurred prior to being employed by the company.

Companies employing accredited certifiers are also reminded of their obligation when obtaining company contracts to ensure that all accredited certifiers that were employees but are no longer employees, as well as currently accredited certifiers employed by the company, are covered by the company insurance contract.

Applying for re-accreditation

When applying for re-accreditation, it is the responsibility of an applicant to demonstrate that he/she has a contract for the whole period during which he/she has been accredited. This may require applicants to demonstrate they have continued to obtain individual contract insurance to cover periods when the certifier worked for himself/herself.

The accreditation body may also require applicants to provide evidence to demonstrate their past employers are continuing to obtain insurance each year which covers the period of the applicant's employment with that employer.



Accredited certifiers while undertaking a site inspection must ensure that site soil erosion controls are maintained and remain effective

NEWS IN BRIEF

Conditions of consent

The Department of Planning recently distributed a letter to all councils, accredited certifiers in NSW and key stakeholders reminding them of the responsibilities of consent authorities in assessing development applications and issuing development consents.

The letter outlined councils' responsibilities under sections 80 and 80A of the EP&A Act, which set out the scope of matters that can be legally dealt with in conditions of development consent and the circumstances under which conditions may be imposed.

For more information on conditions of consent, please refer to the Department of Planning Circular PS05-001 *Occupation certificates and conditions of development consent*, available at www.planning.nsw.gov.au/planningsystem.

Review of the Swimming Pools Act 1992

The Department of Local Government is undertaking a review of the *Swimming Pools Act 1992* and the *Swimming Pools Regulation 1998*. The review is in response to a report by the NSW Water Safety Taskforce, which recommended a number of amendments to the legislation aimed at improving child safety around backyard swimming pools and clarifying the role of local government in enforcing the Act.

A discussion paper has been prepared that outlines the existing requirements of the legislation and recent research into swimming pool safety. The *Swimming Pools Act Review Discussion Paper* can be viewed at www.dlg.nsw.gov.au/dlg/dlghome/dlg_swimmingpoolsreview.asp

Comments and submissions on the *Swimming Pools Act* and *Regulation* are invited and should be forwarded to swimmingpools@dlg.nsw.gov.au by **Friday 15 December 2006**.

Building Professionals Board represented at the ARBS Exhibition



Outlining the proposed accreditation processes at the Exhibition

The BPB was invited to participate in the Air Conditioning, Refrigeration and Building Services Exhibition (ARBS) 2006 held at Darling Harbour on 14–16 August 2006.

The exhibition was sponsored by a number of major industry associations, including the Australian Institute of Refrigeration and Air Conditioning Contractors, Chartered Institution of Building Services Engineers and the Air Movement and Control Association.

The exhibition brought together a large number of professionals responsible for the design, construction and commissioning of mechanical services systems in buildings to standards required of the BCA.

The opportunity to actively participate in the exhibition proved an excellent opportunity for the BPB to answer many enquires from participants with respect to the building certification system and the pre-requisites to becoming an accredited certifier and to seek comments from participants on the draft accreditation scheme.

Association of Consultants in Access, Australia Conference 2006

The Association of Consultants in Access will be holding its 2006 Conference, *Towards Equitable Access For All*, on **1–3 November**. For more information, contact the ACAA on 03 5521 2820.

Upcoming AIBS (NSW) workshops

Heritage Buildings, Twilight workshop, **Wednesday 15 November 2006** at the Epping Club, 45 – 47 Rawson Road, Epping, from 4.00 – 7.00pm.

Timber Framing Code 2006 workshop, **Thursday 23 November 2006** at the Forbes Services Club, Forbes, from 9.00am-4.30pm. This workshop is being conducted jointly by the Central NSW Councils and AIBS, presented by Garry Poole.

For further information on these workshops, contact the Australian Institute of Building Surveyors (NSW) office on 02 9712 8822, or email nsw.admin@aibs.com.au.

Certifier shortage – have your say

The BPB regularly receives comments about the shortage of accredited certifiers and/or the difficulties new graduates face in securing a position as an accredited certifier. We would like to investigate this issue more closely and seek your assistance 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 17 November 2006** to bpb@bpb.nsw.gov.au.



For information on our work:

Web: www.bpb.nsw.gov.au

Email: bpb@bpb.nsw.gov.au

Phone: 02 9895 5950

Subscribing to the BPBulletin

To receive future issues of the BPBulletin, please email:
bpb@bpb.nsw.gov.au

Contacting the BPB

The Building Professionals Board is located at:
Level 3, Macquarie Tower
10 Valentine Avenue
Parramatta
PO Box 3720, Parramatta NSW 2124
Tel: (02) 9895 5950,
Fax: (02) 9895 5949

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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