

PLANNING SYSTEM

Act and regulation changes

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Commencement of council accredited certifiers and amendments to Building Professionals Regulation provisions

The purpose of this circular is to advise councils, accredited certifiers and the community of the commencement of a provision in the *Building Professionals Act 2005* and amendments to the *Building Professionals Regulation 2007* relating to accredited certifiers who undertake building certification work on behalf of a council.

Introduction

A provision of the *Building Professionals Amendment Act 2008* (the BP Amendment Act) will commence on 1 September 2010 requiring councils to use accredited certifiers for all building certification work. Amendments made by the *Building Professionals Amendment Regulation 2010* (the Amending Regulation) will also commence on 1 September 2010.

The Amending Regulation provides exemptions to council accredited certifiers from certain provisions in the *Building Professionals Act 2005* (BP Act) and the *Building Professionals Regulation 2007* (BP Regulation) and allows persons who are engaged by a council as contractors to be accredited to carry out certification work on behalf of council. These changes are summarised below.

Councils and council accredited certifiers should familiarise themselves with the requirements of the BP Amendment Act and the Amending Regulation.

Amendments to the BP Act

On 1 September 2010, section 74A of the BP Amendment Act will commence requiring all councils to ensure that certain certification work done on their behalf is done by an appropriately authorised accredited body corporate or accredited certifier. This can be either a council accredited certifier, a council accredited certifier from another council or an accredited certifier or accredited body corporate operating as a private business.

As a result, from 1 September 2010, councils and council accredited certifiers will be subject to the provisions of the BP Act and BP Regulation.

Amendments to the BP Regulation

Changes to the BP Regulation are as follows:

Definition of council accredited certifier

The definition of council accredited certifier has been amended to include an accredited certifier whose certificate of accreditation is subject to a condition that the certifier may carry out certification work only on behalf of a council.

This amendment allows contractors to become council accredited certifiers.

Prescribed condition of accreditation

The BP Regulation has been amended to alter a prescribed condition of a certificate of accreditation obtained on the recommendation of a council. This amendment means that certificates of accreditation may be granted to people who are engaged by the council as contractors, or employees, providing they have been recommended by the council.

Exemptions for accredited certifiers employed by councils from fines and orders for compensation

The BP Regulation has been amended to provide exemptions for an accredited certifier employed by a council from certain penalties that may be imposed for unsatisfactory professional conduct or professional misconduct under the BP Act.

Accredited certifiers employed by councils will be exempted from the following actions by the Board or Administrative Decisions Tribunal:

- Order to pay the Board a fine not exceeding 1,000 penalty units (\$110,000), and
- Order to pay a complainant compensation up to \$20,000.

These exemptions only apply to these orders. Accredited certifiers employed by councils are still subject to the remaining disciplinary actions under the BP Act.

Exemptions relating to conflicts of interest

Providing design advice

The BP Regulation prescribes the circumstances where a council accredited certifier has and has not been taken to be involved in the design of a development. Clause 18(g) provides that where council accredited certifiers have been involved in the assessment of a development in the course of determining a development application or complying development certificate, they are not involved in design. Amendments have been made to this clause to refer to an accredited certifier issuing a certificate on behalf of council, which includes council accredited certifiers, contractors and any other accredited certifiers issuing certificates on behalf of council.

Relatives of council accredited certifiers

Amendments to the BP Regulation exempt accredited certifiers who carry out certification work on behalf of council from the operation of section 66(1)(c) of the BP Act which would otherwise prevent the issue of a Part 4A or complying development certificate in the following circumstances:

- Where the applicant for the work is an employee of the council, or
- Where the council is the applicant for the work.

Scenarios that would be permitted under exemption provisions

- *Council has the benefit of development consent for a community library facility and makes an application for a construction certificate to the council.*
- *Council is appointed as a principal certifying authority for an arts centre where council is the developer.*

- *The council librarian makes an application for a construction certificate to the council and council issues the certificate.*

Transitional arrangements

Conflicts of interest

Transitional arrangements have been inserted into the BP Regulation to allow councils to continue to carry out certification work that would otherwise be prevented by the conflicts of interest provisions after 1 September 2010.

These transitional arrangements exempt accredited certifiers who carry out work on behalf of council from the operation of section 66(1)(c) of the BP Act in relation to the issue of a Part 4A or complying development certificate to a relative of a council accredited certifier (includes spouse, de facto partner, sibling, parent or child) where:

- the council was appointed as the principal certifying authority before 1 September 2010, or
- an application for a construction or complying development certificate was made to the council before 1 September 2010 and the council was appointed on or after 1 September 2010 as the principal certifying authority for the development, or
- an application for the certificate was made to the council before 1 September 2010 (whether or not the council was appointed as the principal certifying authority).

In all other situations, an accredited certifier who carries out work on behalf of a council cannot issue a Part 4A or complying development certificate to a person who is related to the accredited certifier.

Carrying out certification work

The BP Regulation is amended to exempt councils from the requirement to have an accredited certifier carry out certification work in the following circumstances:

- where council was **appointed as the principal certifying authority** before 1 September 2010, and
- the certification work was done by an accredited certifier employed or engaged by the council whose certificate of accreditation did not authorise the doing of that work, and
- at the time the work was done council did not employ, or have engaged, an accredited certifier whose certificate of accreditation authorised the doing of that work.

Amendments have also been made to exempt councils from the requirement to have an accredited certifier carry out certification work in the following circumstances:

<http://www.legislation.nsw.gov.au>

- where an **application for a construction certificate or complying development certificate was made** to council before 1 September 2010, and
- council was appointed as the principal certifying authority on or after 1 September 2010, and
- the certification work was done by an accredited certifier employed or engaged by the council whose certificate of accreditation did not authorise the doing of that work, and
- at the time the work was done council did not employ or have engaged an accredited certifier whose certificate of accreditation authorised the doing of that work.

Finally, amendments are also made to exempt councils from the requirement to have an accredited certifier issue Part 4A and complying development certificates on behalf of councils where:

- an **application for the certificate** was made to council before 1 September 2010, and
- the certificate was issued by an accredited certifier employed or engaged by the council whose certificate of accreditation did not authorise the issue of the certificate, and
- at the time the certificate was issued council did not employ or have engaged an accredited certifier whose certificate of accreditation authorised the issue of the certificate.

Scenario that would be permitted under exemption provisions

- *Council is appointed as the principal certifying authority for a six storey mixed use building on 30 July 2010 and an occupation certificate is required to be issued after 1 September 2010. Council does not have a council certifier accredited at the required A1 level to issue the occupation certificate.*
- *Council issues a construction certificate for the same development on 18 August 2010 but is not appointed as the principal certifying authority for the development until 6 September 2010. Council does not have an certifier accredited at the required A1 level to issue the occupation certificate.*

Fees

Amendments have been made to Schedule 2 of the BP Regulation to clarify that the fee for a renewal of a certificate of accreditation will be \$250 if the application for renewal is made before 1 March 2013, and if the certificate of accreditation to be renewed is subject to the condition that work can only be carried out on behalf of a council.

Further information

A copy of the *Building Professionals Amendment Regulation 2010* is available on the NSW Government's legislation website:

The application forms, assessment guidelines and other explanatory materials for council accredited certifiers are available at www.bpb.nsw.gov.au.

If you have further enquiries, please contact:

The Building Professionals Board on (02) 9895 5950 or email bpb@bpb.nsw.gov.au.

Note: This and other Department of Planning circulars are published on the web at <http://www.planning.nsw.gov.au/PlanningSystem/Circularsandguidelines/PlanningSystemCirculars/tabid/81/Default.aspx>.

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Important note: This circular 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 circular.

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