

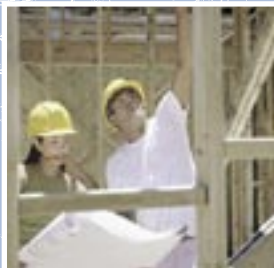


New South Wales
Government

BPB

Building Professionals Board

Professionals Board



Building Professionals Act 2005: a guide

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Building Professionals Act 2005: a guide

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1. Introduction

This guide provides information for accredited certifiers¹ and councils about the changes introduced by the *Building Professionals Act 2005* (BP Act).

The BP Act introduces:

- a single body to accredit and investigate complaints against accredited certifiers and audit private and local council certifying authorities
- new requirements for accreditation and investigation of complaints against accredited certifiers, and auditing of private and local council certifying authorities
- new obligations for and rights of accredited certifiers.

The provisions outlined in this guide are expected to commence mid-2006. See NSW Department of Planning circular 'Implementation of the *Building Professionals Act 2005*' for information on the timetable for implementation.

It is important to note that this guide does not constitute or substitute for legal advice. It is a summary of the main provisions of the BP Act and should be read in conjunction with the BP Act. Throughout the document, the relevant sections of the BP Act are identified for easy cross-referencing. A copy of BP Act is available from the NSW Parliamentary Counsel Office website at www.legislation.nsw.gov.au.

A copy of the Department of Planning circular, 'Implementation of the *Building Professionals Act 2005*', is available at www.planning.nsw.gov.au and www.bpb.nsw.gov.au.

¹ Accredited certifiers are commonly known as 'private certifiers'.

2. Accreditation

The following is a summary of the main provisions of the BP Act affecting the accreditation of certifiers.

Criteria for accreditation [section 4]

The accreditation scheme will set out the criteria for becoming accredited and maintaining accreditation, and will contain:

- qualification, knowledge, skill and experience requirements
- annual professional training requirements and
- the code of conduct for accredited certifiers.

Applying for initial accreditation [sections 6, 7, 10(1), 18, 62–65]

Accreditation applications to the Board must be on the approved form and be accompanied by the fee prescribed by the regulation and such documents and information as are required by the Board. Applicants will be able to apply for accreditation in one or more categories depending on their desired areas of practice, expertise and skill levels.

An initial accreditation application is deemed to be refused 60 days after the Board receives the application, or such longer period as the applicant agrees to in writing. (These deemed refusal provisions do not apply to applicants for renewal.)

Proof of insurance will be required. Insurance requirements will be detailed in the BP Regulation.

Grounds for the Board to refuse accreditation are set out in section 7 of the BP Act.

The Board may grant accreditation subject to conditions, or for a different category to the one applied for.

An applicant for initial accreditation can apply to the Board for an internal review of its decision. (This review power is provided through the Administrative Decisions Tribunal Act.) The applicant can also apply to the Administrative Decisions Tribunal to have the Board's decision reviewed if the applicant is not satisfied with the outcome of the internal review.

Certificates of accreditation have effect for one year from the date issued or last renewed.

Renewing accreditation [sections 5, 6, 7, 10(2), 18]

If an application for renewal of accreditation is submitted in accordance with the requirements of the BP Act and regulations, the accreditation remains in force until the application for renewal is determined. (It is intended that the regulation will set the time within which applications for renewal should be submitted.)

Grounds for the Board to refuse to renew accreditation are set out in section 7 of the BP Act.

If the Board intends to refuse to renew accreditation, or to renew it subject to conditions or in a different category, it must notify the applicant setting out the Board's reasons and giving the applicant 14 days to make submissions to the Board on the matter.

An applicant can apply to the Administrative Decisions Tribunal to review the Board's decision to refuse to renew accreditation, or to issue accreditation in a different category of accreditation to that sought, or to impose or vary a condition of accreditation.

Suspension or cancellation of accreditation [section 8]

The Board may cancel an accreditation if:

- the person dies, or
- the person makes a written request to the Board for the cancellation of that person's certificate of accreditation, or
- the Board made an error in issuing the certificate.

The Board may suspend or cancel an accreditation if:

- the person has been issued a certificate of accreditation on the basis of a misrepresentation made by the person, or
- the Board is satisfied that the person is not covered by the required insurance
- the person is a mentally incapacitated person, or
- the person's equivalent authorisation has been suspended or cancelled (otherwise than at the person's request) under the law of another jurisdiction, or
- the person is an undischarged bankrupt, or
- the person has failed to comply with an order of the Board after an investigation.

In the last four situations above, the Board must first notify the accredited certifier of its intention to suspend or cancel accreditation, set out its reasons, and give the certifier 14 days to make submissions before determining the matter.

Conditions of accreditation [section 9]

The Board can impose conditions on accreditation. The regulation can also prescribe conditions of accreditation.

The Board may, at any time, vary any term or condition of accreditation imposed by it or may impose a new condition on a certificate of accreditation. It can only do this after having given the holder of the certificate of accreditation written notice of its intention to vary or impose the term or condition, setting out its reasons and giving the certifier 14 days to make submissions before the Board determines the matter.

Accreditation register [section 11]

The Board must keep a register of all accredited certifiers containing the details specified in section 11 and any prescribed in the regulation. The register must be made available to the public free of charge.

Powers of the Board to protect the public [sections 12–17]

The Board may suspend a certificate of accreditation or impose conditions on a certificate of accreditation at any time where it is satisfied that it is necessary to protect the safety or property of any person.

The Board may impose a suspension where no complaint has been received about the certifier, and without first providing the certifier with an opportunity to make submissions.

The suspension must be followed by a full investigation into the matter as though the matter were a complaint.

The suspension is for a maximum of eight weeks, but may be extended by the Board if the complaint has not been dealt with.

Any conditions imposed under these powers will apply until the matter investigated is dealt with or the conditions are removed by the Board.

The certifier can apply to the Administrative Decisions Tribunal to review the Board's decision to suspend or impose conditions. The Tribunal may also grant a stay of the Board's decision in some circumstances, for instance, if the operation of the suspension or condition would irreparably damage a certifier's business. In considering an application for a stay or other interim order, the Tribunal must also take into account the public interest.

3. Investigations

The following is a summary of the main provisions of the BP Act concerning investigations.

Grounds for complaints [section 19]

Complaints can be made by any person under the BP Act about an accredited certifier's professional conduct. There will continue to be two forms of unprofessional conduct—unsatisfactory professional conduct and professional misconduct.

The Board will be able to make disciplinary determinations concerning complaints involving unsatisfactory professional conduct. It will have to refer matters involving alleged professional misconduct to the Administrative Decisions Tribunal for determination.

Unsatisfactory professional conduct

Unsatisfactory professional conduct means any of the following (whether consisting of an act or omission):

- conduct occurring in connection with the exercise of the accredited certifier's functions as a certifying authority that falls short of the standard of competence, diligence and integrity that a member of the public is entitled to expect of a reasonably competent accredited certifier [cf. section 109R(a) EP&A Act]
- a contravention of the BP Act or regulation or the EP&A Act or regulation by the accredited certifier, whether or not he or she is prosecuted or convicted for the contravention [cf. section 109R(e) EP&A Act]
- a contravention by the accredited certifier of a law (whether or not a New South Wales law, and whether or not the contravention is an offence) that relates to the functions or obligations of a person as an accredited certifier or the holder of an equivalent authorisation, or involves fraud or dishonesty, whether or not he or she is prosecuted or convicted for the contravention [new]
- a failure to comply with a statutory or other duty, or a contractual obligation, imposed on the accredited certifier by or in accordance with a law (whether or not a New South Wales law) that relates to the functions or obligations of a person as an accredited certifier or the holder of an equivalent authorisation [new]
- the exercise by the accredited certifier of his or her functions as a certifying authority in a partial manner [cf. section 109R(b) EP&A Act]
- the wilful disregard by the accredited certifier of matters to which he or she is required to have regard in exercising his or her functions as a certifying authority [cf. section 109R(c) EP&A Act]
- a failure by the accredited certifier to comply with any relevant code of conduct contained in the accreditation scheme [cf. section 109R(d)(i) EP&A Act]
- a failure by the accredited certifier to comply with a term or condition of the certificate of accreditation [new]
- a failure by an accredited certifier to comply with an order of the Board or the Tribunal under the BP Act [new]

- a failure by the accredited certifier, without reasonable excuse, to comply with a direction or requirement under Part 5 of the BP Act powers of investigation [new]
- wilfully misleading or obstructing the Board in the exercise of any function under Part 3, 4 or 5 of the BP Act [new]
- any other improper or unethical conduct of the accredited certifier that indicates that he or she is unfit to properly carry out the duties of an accredited certifier [new]
- any other conduct prescribed by the regulations [cf. section 109R(d)(ii) EP&A Act].

Professional misconduct

Professional misconduct means conduct that is unsatisfactory professional conduct of a sufficiently serious nature to justify suspension of the accredited certifier's accreditation as an accredited certifier or the cancellation of the accredited certifier's accreditation. This definition is unchanged from the definition contained in the EP&A Act (section 109R).

Making a complaint and preliminary procedures for complaints [sections 20–26]

Anyone can make a complaint.

The Board must inform the certifier of the nature of the complaint within 28 days of receiving the complaint and give the certifier a chance to comment on the complaint.

A complaint can be made against a person whose accreditation has lapsed or has been suspended.

The Board can dismiss a complaint. Grounds for dismissing a complaint are in section 23.

The Board can also facilitate the conciliation of complaints.

Investigation process [sections 27–30]

Investigations must be conducted expeditiously.

A copy of the investigation report is to be given to the certifier with a notice that the certifier may make written submissions to the Board within 28 days of the date of the notice.

The Board may hold one or more meetings to consider a complaint.

Sanctions and penalties [section 31]

The Board will be able to take the following actions for unsatisfactory professional conduct:

- caution or reprimand the certifier
- place conditions on the certificate of accreditation
- order the undertaking of specific education courses
- order the certifier to report on their practices
- impose a fine of up to \$11,000
- order no further action be taken.

The Act removes the need for the certifier to consent to a sanction for unsatisfactory professional conduct (formerly in the EP&A Act).

The Board must provide a written statement of its decision to the complainant and the accredited certifier concerned.

The accredited certifier can apply to the Administrative Decisions Tribunal to review the Board's finding.

The Administrative Decisions Tribunal will continue to deal with matters of professional misconduct. The Tribunal will be able to make any of the following decisions:

- caution or reprimand the certifier
- place conditions on the certificate of accreditation
- order the undertaking of specific education courses
- order the certifier to report on their practices
- impose a fine of up to \$110,000
- order that the certifier cannot re-apply for accreditation within a specified period
- order the payment of up to \$20,000 compensation to the complainant
- suspend or cancel accreditation.

The Board will be required to publicise disciplinary action, including the name and other identifying particulars of the certifier. It will be required to keep a register of disciplinary action and make this available to the public free of charge.

Offences and penalties

The following penalties will apply for offences committed under the BP Act.

Table 1: Summary of offences relevant to accredited certifiers

Section of BP Act	Offence	Maximum penalty units
58(1)	Where a person obstructs, hinders or interferes with an authorised officer in the exercise of the authorised officer's functions under Part 5 of the BP Act	50 (=\$5,500)
58(2)	Where a person fails to comply with a direction or requirement of the Board or an authorised officer made in accordance with Part 5 of the BP Act	50 (=\$5,500)
60(1)	Failure of an accredited certifier, in accordance with the regulations, to cause such documents and records to be kept as are prescribed by the regulations	50 (=\$5,500)
60(2)	Failure of an accredited certifier to provide, within the time required, a copy of any document or record required to be kept under section 60(1) if the Board requests such document or record by written notice served on an accredited certifier	50 (=\$5,500)
61(1)	Failure of an accredited certifier to notify the Board in writing of each of the following events	50 (=\$5,500)

Section of BP Act	Offence	Maximum penalty units
	<p>within 7 days of the accredited certifier becoming aware of the event:</p> <p>(a) the suspension or cancellation of an equivalent authorisation held by the accredited certifier</p> <p>(b) the variation of conditions or the imposition of conditions on an equivalent authorisation held by the accredited certifier</p> <p>(c) the institution of proceedings against the accredited certifier for an offence that relates to the functions or obligations of a person as an accredited certifier or the holder of an equivalent authorisation, or involves fraud or dishonesty</p> <p>(d) the investigation of a complaint against the accredited certifier by an authority of another jurisdiction in relation to anything done or omitted by the accredited certifier as the holder of an equivalent authorisation</p> <p>(e) the accredited certifier's ceasing to be covered by the required insurance (unless notification as referred to in s61(2) (b) has already been provided to the Board)</p> <p>(f) any other event prescribed by the regulations for the purposes of the subsection.</p>	
61(2)	<p>Failure of an accredited certifier to notify the Board in writing at least 7 days before the required insurance held by an accredited certifier expires:</p> <p>(a) that arrangements have been made for the accredited certifier to be covered from that expiry by further insurance and including in that notification evidence of those arrangements, or</p> <p>(b) stating that the accredited certifier has been unable to obtain further insurance to take effect from that expiry.</p>	50 (=\$5,500)
61(3)	<p>Failure of an accredited certifier to notify the Board in writing of any change required to the particulars recorded in the accreditation register in relation to the accredited certifier (other than a change required because of an event referred to in section 61(1)) within 14 days of the accredited certifier becoming aware of the need for the change</p>	10 (=\$1,100)
63(1)	<p>Where an accredited certifier exercises the functions of a certifying authority, or holds himself</p>	100 (=\$11,000)

Section of BP Act	Offence	Maximum penalty units
	or herself out as being covered by the required insurance, when they are not covered by the required insurance	
66(1)	Where an accredited certifier issuing a Part 4A certificate or complying development certificate in relation to any aspect of development: (a) has been involved in the design of that aspect of the development, or (b) has been involved in the carrying out of work on that aspect of the development, or (c) the applicant for the certificate or is related to the applicant for the certificate, or (d) is associated with the council of the area in which the development is to be carried out, or (e) is related to a person who was involved in the design or construction of that aspect of the development, or (f) has a pecuniary interest in that or any other aspect of the development.	300 (=\$33,000)
72	Where an accredited certifier does any thing that is required by law to be done by an accredited certifier, but the accredited certifier's certificate of accreditation does not authorise the accredited certifier to do that thing	300 (=\$33,000)
73	Where an accredited certifier contravenes or fails to comply with any term or condition of the accredited certifier's certificate of accreditation	300 (=\$33,000)
74	Failure of a person (other than a council) appointed as the principal certifying authority for a development to give notice, in accordance with this section, to the person who made the appointment of: (a) the suspension or cancellation of the relevant certificate of accreditation, or (b) any change in the certificate of accreditation or conditions imposed on it that would prevent the appointed person from carrying out his or her duties as principal certifying authority for the development.	50 (=\$5,500)
84(1)	Where an accredited certifier seeks or accepts, or offers or agrees to accept, whether on his or her own behalf or on behalf of any other person, any benefit of any kind on an understanding that he or she will act otherwise than impartially in the	10,000 (=\$1,100,000) or imprisonment for 2 years, or

Section of BP Act	Offence	Maximum penalty units
	exercise of his or her functions as a certifying authority	both
84(2)	Where a person, on an understanding that an accredited certifier will act otherwise than impartially in the exercise of his or her functions as a certifying authority, gives, or offers or agrees to give, any benefit of any kind, whether to the accredited certifier or to any other person	10,000 (= \$1,100,000) or imprisonment for 2 years, or both
85(1)	Where a person who: (a) issues a Part 4A certificate or complying development certificate that he or she is not authorised by or under the BP Act or the EP&A Act to issue, or (b) makes any statement that is false or misleading in a material particular in, or in connection with, a Part 4A certificate or complying development certificate.	300 (= \$33,000)
85(2)	Where an accredited certifier falsely represents that he or she is a certifying authority or principal certifying authority in relation to any development	300 (= \$33,000)
86	Where a person impersonates, or falsely represents that the person is, an authorised officer	50 (= \$5,500)

The regulation is likely to make some of these offences subject to penalty infringement notices.

Audits [sections 45–47]

The Board will take over the Department of Planning's power to investigate the work and activities of councils and accredited certifiers acting as certifying authorities (often called audits).

If an audit of an accredited certifier's activity discloses unsatisfactory professional conduct or professional misconduct, the Board may proceed to deal with the matter as if it were a complaint. For any audit of the work and activities of a council, the Board must prepare a report which must be provided to the council and made publicly available. The Board will also be able to make recommendations to the Director General of the Department of Local Government where it is of the opinion that the council has not taken appropriate action on a matter investigated by it.

Powers relating to investigations [sections 48–59]

These sections give the Board powers to enter property and take documents and other material under certain circumstances to conduct investigations. These investigation powers apply equally to complaints and audits.

4. Obligations of accredited certifiers

The following provisions do not come into effect until the Board takes over the accreditation and disciplinary functions from existing accreditation bodies.

Record keeping [section 60]

The detailed requirements for record keeping will be contained in the regulation. It is expected the regulations will provide that certifiers can keep documents off site (but in secure premises) for 10 years (rather than for 15 years as presently required under the EP&A Act) to bring the record keeping requirement into line with the 10-year liability period under the BP Act.

Insurance [sections 62–65]

The detailed requirements for insurance held by accredited certifiers will be contained in the regulation. They are not expected to change significantly from current requirements in the EP&A Regulation.

Conflicts of interest [sections 66–71]

The conflicts of interest provisions (see Table 1 summary) are substantially the same as those in the EP&A Act, except:

- a new ground is introduced to prevent accredited certifiers from certifying the design or construction work of a person in the same or a related company
- the Board will be able to exempt an accredited certifier from the conflicts of interest provision of being associated with the council of the area in which the development is to be carried out
- the regulation will clarify the meaning of being involved in the 'design' of an aspect of the development (including distinguishing design from compliance advice) for the purposes of clarifying whether a conflict of interest situation arises or not.

A separate circular will be issued on conflict of interest before the provisions commence.

5. Savings and transitional provisions

The savings and transitional provisions in schedule 2 of the BP Act are summarised in Table 2.

Table 2: Savings and transitional provisions

Circumstance when the Board's accreditation and disciplinary functions come into effect	Savings and transitional provision under BP Act
Holder of current accreditation issued under EP&A Act by an existing accreditation body	Taken to be holder of accreditation under BP Act
Accreditation application lodged with an accreditation body authorised under the EP&A Act but undetermined	Application taken to have lapsed
Existing disciplinary finding	Taken to be disciplinary finding under BP Act
Audit of an accredited certifier or council under EP&A Act	Taken to have been completed under BP Act
Incomplete audit into accredited certifier or council under EP&A Act	Can be continued by the Building Professionals Board under the BP Act
Undetermined complaint lodged with accreditation body authorised under the EP&A Act	Complaint to be dealt with by Building Professionals Board under BP Act

The regulation is expected to contain more detailed savings and transitional provisions concerning the application of the accreditation scheme made under the BP Act to currently accredited certifiers.

6. Other changes

Change of principal certifying authority [section 109EA, EP&A Act]

The EP&A Act has been amended to allow two methods for changing principal certifying authority (PCA):

- *approval* by the Board to the change (and notification of the relevant council and consent authority), or
- *agreement* to the change of PCA by the current principal certifying authority, the proposed principal certifying authority and the person who appointed the current principal certifying authority, and *notification* to the Board, the relevant council and consent authority before the replacement occurs.

These provisions will not commence until the Board takes over accreditation and disciplinary functions from the existing accreditation bodies. The Board will issue further advice, including application forms, on the change of PCA process.

Structural changes

The BP Act makes consequential structural changes to the EP&A Act by removing parts of the EP&A Act dealing with the accreditation and investigation of accredited certifiers. These are summarised in the Appendix 1.

Appendix 1

Changes to the EP&A Act and associated legislation

The main changes are summarised below:

Act or Regulation	Changes
EP&A Act Part 4B – Accreditation of certifiers	Removed from EP&A Act. Replaced by provisions in the BP Act.
EP&A Act Part 4C – Liability and insurance	Removed from EP&A Act. Replaced by provisions in the BP Act.
EP&A Regulation Part 11 – Insurance	Removed from EP&A Regulation. Will be replaced by provisions in the BP Regulation.
<i>Strata Schemes (Freehold Development) Act 1973 and Strata Schemes (Leasehold Development) Act 1986</i>	Consequential changes