

## Guiding Development – Practice Notes

# Who is responsible? Liability issues

The purpose of this practice note is to outline the relationship between issuing a certificate and liability for defective works.

### Proportionate liability

The NSW Government intends that the people responsible for things under the Act are liable for how those things are done. In particular, liability for any defective work is apportioned to those who are actually responsible for it. The Part 4A Certificates make clear what certifiers and consent authorities are taking responsibility for:

- construction certificates — a check on compliance with the Building Code of Australia (BCA) or technical subdivision standards and other matters at the detailed design and documentation (specification) stage
- occupation certificates — a post-construction check on whether buildings are suitable for occupation or use in accordance with their BCA classification
- subdivision certificates — issued before or after subdivision work is undertaken, providing a check on compliance with conditions and that necessary approvals are in place
- compliance certificates — certifying that certain conditions of development consent have been satisfied, that work has been undertaken in accordance with approvals and/or a building's BCA classification.

In addition, complying development certificates certify that a development proposal satisfies the standards in council's local environmental plan, development control plan or in a State environmental planning policy. This will include compliance with the BCA and site-specific matters.

Section 109P of the *Environmental Planning and Assessment Act 1979* (the Act) limits liability when such certificates are relied upon. The section reads:

### 'Satisfaction as to compliance with conditions precedent to the issue of certificates

- (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.'

### When does liability start?

Liability may arise at any point during either a certifier's or a council's involvement with a development project. Liability also arises when an accredited certifier or a consent authority issues any type of certificate.

### When does liability finish?

The Act provides that liability finishes ten years after an accredited certifier or consent authority issues an occupation certificate for a building or a subdivision certificate.

The Environmental Planning and Assessment Regulation 1994 (the Regulation) also allows for insurers to restrict their cover to those claims against an accredited certifier up to:

- 10 years from the date of the last inspection, if an occupation certificate is not issued, or
- 10 years from the date the building is occupied if an occupation certificate is not issued and if no inspections have been carried out.

All accredited certifiers must have a specified level of professional indemnity insurance to cover their liability for the ten-year period.

Clearly, it is in the interest of all those involved in a project to have an occupation or subdivision certificate issued — including the owner or occupier.

#### **Construction certificates and compliance with the BCA**

The level of detail required in plans and specifications in order to confidently issue construction certificates is the subject of Practice Note: *Construction certificates and the BCA*.

#### **Subdivision certificates**

The legislation currently gives councils the discretion to allow the private sector to issue subdivision certificates. Councils can do this by identifying the type of subdivision that can be privately certified in its local environmental plan. Until councils prepare these plans, councils have the responsibility for issuing subdivision certificates.

#### **Occupation certificates and compliance certificates**

To decide if a building is suitable for occupation or use in accordance with its BCA classification, the PCA may rely on one or more compliance certificates. In doing so, the PCA will not be liable for any matter covered by those certificates. A PCA can issue an occupation certificate without the need for a compliance certificate. In this case the PCA assumes all the liability in the first instance for any defective building work arising out of negligence during the process.

If a PCA disagrees with a compliance certificate issued by another certifier or the council, then the PCA has the option not to rely on the compliance certificate. By not relying on a compliance certificate, the PCA carries the liability for that aspect of the work.

#### **PCA negligence and liability for defective work**

A PCA, whether a council or an accredited certifier, has discretionary powers under the Act and will be subject to the ordinary principles of the law of negligence in carrying out those functions.

For a PCA to be held liable for defective work, a person must show:

- that the PCA owed a duty of care to that person
- that the PCA breached that duty of care
- the person suffered damage as a result of that breach.

Whether a PCA owed a duty of care to a person and breached that duty will depend on many factors, including the responsibilities that a PCA takes on in the construction stage of the development.

For example, the PCA is responsible for issuing the final occupation certificate for new buildings. To do this the PCA must be satisfied that:

- a development consent (or complying development certificate) is in force
- a construction certificate has been issued
- the building is suitable for occupation or use in accordance with its classification under the BCA
- matters in the Regulation have been complied with.

These statutory preconditions constitute a starting point in identifying the scope of the PCA's responsibilities in relation to the issue of an occupation certificate. The precise scope is determined by those parts of the BCA relating to the relevant classification of the building.

The Government intends that the PCA be involved throughout the construction stage, with an overarching responsibility to supervise the work of others, including other certifiers. The requirement to appoint a PCA before construction, the continuity provisions — maintaining the same PCA throughout — and the power for PCAs to issue notices in relation to orders are evidence of the breadth of the PCA's role. In this light, the PCA may also have a responsibility to ensure that buildings are constructed in accordance with the development consent.

The proportionate liability provisions protect the PCA when someone else issues a construction, compliance or complying development certificate. However, the PCA needs to exercise a reasonable standard of care in determining any detailed design issues, a minimum level of inspections and construction supervision to fulfil the responsibilities under the Act. The judgement as to the reasonable standard of care will depend upon the type of development and in part, may be determined by best practice (or acceptable standards) by the private sector and by councils.

For private PCAs, their role can best be specified in a service agreement. These agreements may limit or exclude liability of the PCA in negligence as between the contracting parties. Even so, the PCA might be found to owe a duty of care to a subsequent purchaser in relation to defective work. For advice on the content of such agreements, see Practice Note: *The role of the principal certifying authority*.

Note that the role of the PCA is open to competition and therefore councils do not have the ability to restrict competition by specifying a role for the PCA in any conditions of consent — including inspections. The council may add advisory notes to a consent or refer to a separate policy document, specifying their role if appointed PCA.

#### **What happens if an occupation certificate is not issued?**

There are various reasons why an occupation certificate may not be issued. The defective work could become apparent before the building is finished or the certifier may fail to issue a certificate. For class 1a or 10 buildings and any buildings built by or on behalf of the Crown, the owner or tenant can occupy and use the building without an occupation certificate being issued.

However, the mere fact that an occupation certificate was never issued does not mean that the PCA will escape liability. In many situations the PCA, given its broad role in the construction phase, may owe a duty of care to another party or have contractual obligations with the developer. Breach of the duty or the obligations may give rise to liability.