

# Summary of Selected Complaints & Investigations

March 2010

This Summary is the first in a regular series of summaries of selected complaints made to the Board about the conduct of accredited certifiers.

It is intended to assist accredited certifiers, consent authorities and the public to achieve good outcomes from the certification process.

Complaints relating to the certification process can, in most cases, be avoided when all parties to the process – the landowner/developer, consent authority and certifier – are completely aware of their responsibilities and obligations.



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## Case study 1: Responsibility for determining the estimated cost of development

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### The complaint or issue

An accredited certifier issued a complying development certificate without accurately determining the cost of the building work, contrary to the requirements of the *Building and Construction Industry Long Service Levy Payments Act 1986* (Levy Payments Act).

### Details

An accredited certifier issued a complying development certificate for alterations and additions to an existing dwelling and the relocation of a pergola. The signed application for the certificate estimated the cost of the development at between \$12,000 and \$15,000; however, no contract was provided to confirm this estimate.

A more accurate estimate would have been between \$30,000 and \$35,000. As the certifier believed they did not have responsibility to determine the cost of the work for the purpose of determining whether a long service levy payment was required (as it would be for works exceeding \$25,000), the certifier issued the complying development certificate without the payment of a long service levy.

### Findings and outcome

Section 40 of the Levy Payments Act places the onus for determining the cost of the building works, in the absence of a contract price, on the certifying authority. The certifying authority must also ensure evidence is obtained regarding the payment of any required long service levy payment prior to the issue of a complying development certificate or a construction certificate.

Therefore, it was incumbent on the accredited certifier to determine the cost of undertaking the works. The Board found the allegation was proven with the certifier being cautioned and, as a result of other investigations, fined \$1000.

**Tip:** For a complying development certificate refer to section 85(10A) of the *Environmental Planning and Assessment Act 1979* (the Act) while for a construction certificate refer to section 109F(1)(b) of the Act.

## Case study 2: Implications of contradictory conditions within a consent

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### The complaint or issue

Council issued development consent, on a deferred commencement basis, to allow for the construction of a residential building. One of the deferred commencement items required the identification of a stair platform lift to facilitate access from the basement to an adaptable unit. An accredited certifier issued a construction certificate that was inconsistent with the drawings that were received by council to satisfy the deferred commencement matters.

#### Details

Council confirmed in writing that a set of amended drawings satisfied the deferred commencement matters, but in correspondence to the applicant failed to identify these drawings. Council referred only to their original deferred development consent and the drawings referenced by that consent.

The accredited certifier issued a construction certificate that was inconsistent with the drawings received by council to satisfy the deferred commencement matters. The departures of most concern were the absence of a stair platform lift and the provision of suitable access to an adaptable unit.

Although amended drawings were not referenced within the now operative consent, conditions of consent required that one adaptable unit be provided in accordance with council's relevant DCP, while a further condition required the drawings to be amended to provide one adaptable unit complying with AS4299 and access from the basement car park to be in accordance with AS1428.1. Further investigation revealed that these conditions and the requirements of the DCP were in fact contradictory.

#### Findings and outcome

The Board found the drafting of contradictory requirements in the development consent together with council's failure to identify the drawings (being the subject of the deferred commencement approval letter) caused ambiguity and uncertainty for the certifier. The Board therefore found that the allegation was not proven.

**Tip:** Consent authorities should ensure plans or drawings that satisfy any deferred commencement matters are suitably referenced as 'approved plans' upon the release of an operative consent.

## Case study 3: Role of the PCA in ensuring compliance with conditions of the development consent

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#### The complaint or issue

Section 94 contributions were not paid to council until four months after works commenced on site – even though the conditions of the development consent required the developer to pay the contributions prior to the notification of commencement of building works and the appointment of the PCA.

#### Details

Conditions of the development consent required the payment of section 94 contributions prior to the notification of commencement of building works and the appointment of the PCA.

#### Findings and outcome

The conditions of consent did not place any responsibility on the accredited certifier (appointed as the PCA) to require payment of the section 94 contributions. The wording provided within the condition, intentionally or otherwise, placed the onus on the 'developer' to ensure the nominated section 94 contributions were paid prior to the lodgement of the notification of commencement of building works and PCA appointment. The Board found that the allegation was not proven.

**Tip:** Conditions of consent should be worded so as to ensure that the responsibility for satisfying the condition rests with the intended person/authority. In this case the responsibility did not fall or rest with the accredited certifier appointed as the PCA. In addition, landowners/developers should check the wording of all conditions as the responsibility for satisfying conditions does not always fall prior to the issuing of a certificate (whether a construction certificate or an occupation certificate).

## Case study 4: Restrictions on issuing complying development certificates

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### The complaint or issue

An accredited certifier issued a complying development certificate for a change of use for a retail/commercial development on land zoned Residential 2(a), contrary to the requirements contained within council's DCP.

### Details

The site on which the complying development certificate was issued was zoned Residential 2(a) under council's LEP. The site benefited, in the past, from "existing use rights" under section 106 of the Act. The certifier issued a complying development certificate to allow for a change of use for a retail/commercial activity which would, other than relying on existing use rights, be prohibited in the zone.

### Findings and outcome

Council's DCP (in relation to complying development) stated that a complying development certificate could only be issued if it could otherwise be carried out with consent on the land and not rely on existing use rights. The development was prohibited in the Residential 2(a) zone. The certifier did not have the authority to issue a complying development certificate as the zoning of the land prohibited approval of the development as complying development. The Board found that the allegation was proven and the certifier was reprimanded.

**TIP:** Prior to issuing a complying development certificate, certifiers must check the complying development requirements contained within relevant DCPs.

## Case study 5: Issuing of an occupation certificate / notification of a change to the PCA

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### The complaint or issue

A final occupation certificate was issued by an accredited certifier who was not appointed as the PCA for the development.

### Details

An accredited certifier issued a construction certificate for alterations and additions to a class 10a building. That same certifier was later nominated as the PCA for the development. Upon the completion of the development a final occupation certificate was issued. However, the certificate was not issued by the certifier who was appointed as the PCA.



Although an application for a replacement of the PCA was made to the Board, the application was made after the final occupation certificate had been issued.

#### Findings and outcome

The Board found that the actions of the certifier would undermine confidence in the certification system and may have serious consequences for people who rely, in good faith, on the certificate.

The Board found the allegation was proven. The certifier was reprimanded and, as a result of other investigations, fined \$2000.

**Tip:** The provisions contained within Clause 162(1) of the Environmental Planning and Assessment Regulation 2000 (the Regulation) and section 109D(2) of the Act clearly set out the requirements for the replacement of a PCA and who can issue an occupation certificate.

## Case study 6: The making of a construction certificate application

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#### The complaint or issue

The certifier failed to obtain the consent of one of the owners of the land to the making of an application for a construction certificate.

#### Details

Council issued development consent to allow for the conversion of a scout hall to a dwelling, the construction of a double garage and the creation of a new driveway and retaining wall. The applicant approached the certifier to issue a construction certificate and act as the PCA. Prior to determining the application for the construction certificate, the certifier was advised that council had requested that the development consent be surrendered on the grounds that the consent of all the owners of the subject land had not been obtained to the submission of the development application.

The certifier was (verbally) advised by the applicant that the dispute between the owners had been resolved. Council's acceptance of section 94 contributions, damage deposits and long service levy payments, after its correspondence warning that the consent may in fact be invalid, was seen by the certifier as confirmation that a resolution had been reached. The certifier issued the construction certificate without obtaining the consent of all owners to the submission of the application.

#### Findings and outcome

Clause 5(g) of Part 3 of Schedule 1 of the Regulation required the consent of all owners of the land to the making of an application for a construction certificate. While the allegation was proven, the Board found the evidence indicated mitigating circumstances in which the certifier acted in good faith. The certifier was cautioned.

**TIP:** In any situation where a certifier is relying on advice, it is strongly recommended they obtain the advice in writing. In addition, Clause 5(g) of Part 3 of Schedule 1 of the Regulation has been repealed. An application for a construction certificate is now not required to be accompanied by the consent of the owners of the land.



## Contacting the Board

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