

Summary of Selected Complaints & Investigations

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This Summary describes case studies of complaints made about the conduct of accredited certifiers. These case studies can assist and educate stakeholders involved in the certification process.



**Building
Professionals
Board**

Case study 1: Failure to comply with the BCA – open deck car park and effective height of a building

The complaint or issue

The certifier issued a construction certificate that did not comply with the Building Code of Australia (BCA) and then issued a final occupation certificate when the building was not suitable for occupation or use in accordance with its classification under the BCA.

Details

A certifier issued a construction certificate for a residential flat development, car parking and associated facilities. The certifier incorrectly assessed the car park as an open deck car park and incorrectly assessed the effective height of the building within the meaning of the BCA.

Following construction, the certifier issued a final occupation certificate when the building was not suitable for occupation or use in accordance with its classification under the BCA.

Findings and outcome

Under sections 81A(5) and 109F of the *Environmental Planning & Assessment Act 1979* (EP&A Act) a construction certificate must not be issued unless the requirements of the regulation have been complied with.

Clause 145(1)(b) of the Environmental Planning and Assessment Regulation (EP&A Regulation) requires that a construction certificate not be issued unless the proposed building will comply with the relevant requirements of the BCA (as in force at the time the application for the construction certificate is made).

Section 109H(1)(5)(c) of the EP&A Act requires that a final occupation certificate not be issued unless the building is suitable for occupation or use in accordance with its classification under the BCA.

The Board found that the construction certificate and accompanying plans did not comply with the requirements of the BCA. The certifier's assessment of the construction certificate application was flawed because of:

- the classification of the car parking level as an open deck car park
- the determination of the effective height of the building as being less than 25 metres.

The certifier issued a construction certificate when the car park and building should have been provided with a sprinkler system. The plans approved with the construction certificate provided for an enclosed car park for more than 40 cars. The deemed to satisfy provisions of the BCA therefore required the installation of a sprinkler system to the enclosed car park.

Further, the plans indicated that the floor of level 11 of the building was not a 'mezzanine' being an intermediate floor within a room but rather a 'storey' as defined under the BCA. The additional storey meant that the effective height of the building exceeded 25 metres. The construction certificate therefore failed to comply with several provisions of the BCA for a building with an effective height of greater than 25 metres, including the need for sprinklers, two exits, a fire control facility, emergency lifts and an emergency warning and intercommunication system.

The Board found that the allegations were proven and the certifier was reprimanded and fined \$15,000.

REMINDER: Certifiers must carefully consider the definition of a 'mezzanine' when determining the effective height of a multi-storey development.

Case study 2: ADT review of a Board finding – fire safety in a residential flat building

The complaint or issue

A certifier applied to the Administrative Decisions Tribunal (ADT) pursuant to section 33 of the *Building Professionals Act 2005* (BP Act) for a review of the Board's disciplinary finding of unsatisfactory professional conduct arising from five allegations of incompetence in the certification of a residential flat building. The Board had administered a reprimand and fined the certifier \$5,000.

Details

Four of the allegations related to the adequacy of the occupation certificate issued by the certifier. Three of these allegations asserted a failure to ensure that the required fire safety measures were met whilst one allegation related to the adequacy of door handles fitted to egress doors leading to required exits for evacuation. Some doors were installed with tulip style door handles instead of downward lever action handles and therefore failed to comply with clause D2.21 of the BCA.

A further allegation related to a failure to ensure copies of the approved plans accompanied the notice of determination of the construction certificate forwarded to the Council.

The certifier argued that he acted competently in relying on fire safety certificates provided to him by installers and the owner. The certifier submitted that the omissions on his part were not of significance or gravity to justify a finding of unsatisfactory professional conduct.

Findings and outcome

In determining this matter, the ADT found that an accredited certifier is expected to be sceptical of the reliability of a certificate presented by a trade supplier or installer as these documents may be affected by a lack of detachment and partiality.

Likewise, the ADT found an accredited certifier should be sceptical of a fire safety certificate provided by an owner. The certifier should form a view as to what fire safety requirements should be referenced and identified and should engage in basic practical checks wherever possible, if they are to be satisfied that the required systems have been installed and are working. This is a duty of high importance in relation to fire safety matters.

The ADT found that the certifier failed to adhere to the standards expected by a member of the public. In its determination, the ADT found:

Minimum professional standards of competence are not set by 'industry practice'. The benchmark in this legislation is the standard of competence, diligence and integrity a member of the public is entitled to expect of a reasonably competent accredited certifier. In our view, a member of the public, with an understanding of the statutory role performed by an accredited certifier, would not have regarded it as

acceptable at least as at 2004 and 2005 for a certifier to rely, blindly, on the word of an installer, without having formed an independent view of what standards should be referenced, making enquiries if the applicable standards were not referenced, and, wherever practical, performing simple, independent checks (for example, visual inspection of items externally exposed) to corroborate the sign-off provided. We doubt whether it would have been regarded as ever being acceptable practice for a certifier to sign off without ever having undertaken a careful site inspection of the finished works.

The ADT concluded that the certifier failed to adhere to the standards reasonably to be expected by a member of the public and reaffirmed the Board's decision in this matter.

REMINDER: Certifiers must assess the suitability of a certificate before relying on it. Certificates should:

- indicate the suitability of the signatory to sign off on the works and include contact details of the signatory
- indicate the whole or part of the building to which the certificate relates
- include a description of the work and property address
- reference the relevant BCA clauses and Australian Standards including the year of adoption and other provisions relied upon in issuing the certificate
- be signed and dated.

Case study 3: Factors considered by the ADT in making disciplinary orders – fire safety, access and public official role

The complaint or issue

In March 2010, the ADT found an accredited certifier guilty under section 31(1) of the BP Act of professional misconduct. In November 2010, this matter was again before the ADT for the determination of disciplinary orders.

Details

The ADT's finding of professional misconduct related to the certifier's conduct in certifying two developments. In these cases, the certifier was found to have made errors of judgement in relation to fire safety requirements and disability access requirements at both the construction certificate and occupation certificate stages. The fire safety omissions included inadequate separation distances between openings and the boundary, required exit door swing against the direction of egress, obstruction of exits or exit pathways, inadequate exit signage and lack of required certification as to the fire rating of floor coverings.

The gravity of the certifier's conduct, in the ADT's view, required a finding of professional misconduct in relation to each of the applications.

In determining the disciplinary orders in this case the ADT considered:

- The number and seriousness of the contraventions that affected the two projects and the certifier's attitude to compliance. The ADT found the certifier exhibited a pattern of non-compliance with statutory requirements and had given little weight to the wider

community interest in ensuring that building standards are met, especially for future occupants, visitors and users.

- The certifier's record in respect to previous disciplinary matters and the certifier's attitude to the adverse disciplinary outcomes to which he had been subject.
- The extent of the failure to rectify the errors revealed in the projects and the certifier's attitude to compliance during the hearing. The ADT found that the certifier tended to delegate responsibility, not carry out final inspections and signed certificates based on input from others.
- The certifier's failure to implement improvements to his certification practice.

In considering this matter, the ADT found:

The accredited certifier is not merely a privately-practising professional, but is administering a public office under the law of the State. The certifier makes decisions that once could only be made by a public instrumentality, mostly typically the local council. The public must be confident that certifiers will rigorously enforce compliance with the minimum standards required by the conditions of a development approval.

Findings and outcome

The ADT ordered:

1. The certifier's certificate of accreditation is cancelled.
2. The certifier can not reapply for a certificate of accreditation for two years.
3. The certifier is disqualified from being an accredited certifier director of, or being otherwise involved in the management of, an accredited body corporate for five years.
4. The certifier is fined \$12,000.

REMINDER: Certifiers must be aware of their obligations as public officials, in particular in carrying out their responsibilities as PCA diligently and adopting practices that will minimise the possibility of breaching their duties.

Case study 4: Issuing a CDC without regard for the relevant criteria – geotechnical and mine subsidence

The complaint or issue

The certifier issued a complying development certificate that did not comply with the development standards in Council's development control plan (DCP) for complying development.

Details

The certifier issued a complying development certificate for a swimming pool and deck associated with a residential dwelling. The plans associated with the complying development application lacked sufficient detail to determine whether the application satisfied the development standards for complying development contained in Council's DCP.

Findings and outcome

The land to which the complying development certificate was issued is located within a geotechnical zone and a mine subsidence area. In accordance with Council's DCP, complying development cannot be undertaken on land within these areas unless prior certification from a geotechnical engineer and the approval of the Mine Subsidence Board has been obtained. In determining the complying development proposal, the certifier failed to obtain such certification and approval.

In addition, Council's DCP contains specific development standards that must be satisfied for different types of complying development. For swimming pools and associated decks, these standards include requirements on minimum side and rear boundary setbacks, maximum height, maximum deck width and size.

Section 85A of the EP&A Act requires that in evaluating an application for complying development, certifiers must determine whether the development is complying development and whether the development complies with the relevant development standards, including the standards and conditions in a Council's DCP.

Plan and specifications for a complying development application must comply with Part 2 of Schedule 1 of the EP&A Regulation. These requirements include a site plan of the land, a sketch of the development, a detailed description of the development and appropriate building work plans and specifications. The site plan and sketch of the development must indicate detailed information regarding the site and the proposed works.

The plans associated with the complying development certificate failed to depict any dimensions, including details to demonstrate compliance with Council's DCP standards in relation to side and rear boundary setbacks, maximum height and deck size. The swimming pool and deck were subsequently constructed in a manner that did not comply with the development standards of Council's DCP.

The Board found that the allegation was proven and the certifier was reprimanded and fined \$1,000.

REMINDER: Certifiers should:

- check the development standards of the relevant environmental planning instrument under which the development is complying development
- ensure the complying development application complies with Part 2 of Schedule 1 of the EP&A Regulation and includes sufficient information to undertake the assessment
- consider whether to obtain a section 149 certificate as it will provide information relevant to complying development.