

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: Issuing an OC for a tenancy when none issued for the base building

The complaint or issue

The Building Professionals Board received a complaint that an accredited certifier:

- accepted a combined application for a construction certificate (CC) and appointment as a principal certifying authority (PCA) that was not made in accordance with clause 139 of the EP&A Regulation and section 109E(1A) of the EP&A Act, respectively
- did not endorse the CC application in accordance with clause 139(2) of the EP&A Regulation
- issued a CC that was not in accordance with clause 147 of the EP&A Regulation
- issued an occupation certificate (OC) that was inconsistent with clause 155 of the EP&A Regulation
- issued an OC for a shop fit-out at a time when an OC and relevant fire safety certificate had not been issued for the base building
- acted outside their terms of accreditation in certifying the relevant building.

Details

After issuing a combined CC and entering into a PCA agreement based on a deficient application, the certifier failed to endorse receipt of the application and proceeded to issue a CC containing incorrect details.

No fire safety certificate or fire safety schedule accompanied the OC, nor did a statement that the health and safety of the building occupants had been taken into consideration. The OC did not clearly state the type of certificate being issued.

The final OC for a shop fit-out predated the interim OC for the base building. The certifier issued the CC and OC for the shop fit-out in a building that contained alternative solutions even though their accreditation did not allow them to certify buildings that achieve compliance with the Building Code of Australia (BCA) by way of an alternative solution.

Findings and outcome

Construction certificate

Clause 139(2) of the EP&A Regulation requires that immediately after receiving an application for a CC, the certifying authority must endorse the application with the date of receipt. The application for the CC in this case was not endorsed with the date of its receipt.

Clause 139 also requires applications for CCs to be made by a person eligible to appoint a PCA for the relevant development and section 109E(1A) of the EP&A Act prevents the appointment of a PCA being made by any contractor or other person who will carry out the building work unless the contractor or other person is the owner of the land on which the work is to be carried out.

In this instance, the combined CC application and appointment of the PCA was made by the builder and was neither dated, nor signed by either the owners or the applicant. There was no evidence to indicate the owners had appointed the certifier.

In part, clause 147 of the EP&A Regulation requires a CC to contain the identity and accreditation number of the certifying authority. The CC quoted the incorrect accreditation number, name of the certifying authority and relevant accreditation body.



Occupation certificate

Clause 155(2) of the EP&A Regulation requires an OC for specified buildings to be accompanied by a fire safety certificate and fire safety schedule for the building. In this instance, the final OC was accompanied by neither.

Clause 155(1)(d) of the EP&A Regulation requires an OC to indicate the type of certificate being issued - interim or final. However, in this case, the title stated 'Interim Occupation Certificate' on the first page of the certificate and 'Final Occupation Certificate' on the second page.

Clause 154(1)(a) of the EP&A Regulation specifies that an interim OC authorising a person to commence occupation or use of a partially completed new building must not be issued unless the building will not constitute a hazard to the health or safety of the occupants of the building.

Clause 155(1)(e)(i) of the EP&A Regulation requires an OC to contain a statement that the health and safety of the occupants of the building have been taken into consideration where an interim OC is being issued. In this regard, the interim OC for the shop fit-out was issued when the base building was still under construction - which was generally considered to be unsafe.

Terms of accreditation

The certifier held A2 accreditation with the following condition attached:

The accredited certifier is restricted to issuing certificates for buildings where compliance with the performance requirements of the Building Code of Australia (BCA) is achieved solely by compliance with the deemed-to-satisfy provisions of the BCA. The accredited certifier must not issue certificates for buildings where an alternative solution is proposed to achieve compliance with the relevant performance requirements of the BCA.

The fire safety certificate for the base building revealed the base building was the subject of various alternative solutions to achieve compliance with the BCA. The certifier acted outside the terms of their accreditation in issuing the CC and interim OC.

The Board found the allegations proven and the certifier was reprimanded, fined \$3,000 and further conditions were placed on their accreditation.

REMINDER: Certifying authorities must:

- ensure all applications for certificates and PCA appointments are complete and include details of the owner and the applicant
- ensure CCs are complete, accurate and include their identity and accreditation number
- have appropriate procedures in place to ensure applications are endorsed with a date of receipt immediately after the application is lodged
- where required, accompany OCs with a fire safety certificate and fire safety schedule and correctly state the type of certificate being issued (the standard template/form for an OC may assist)
- not issue OCs for partially completed buildings if the building is hazardous to the health and/or safety of future occupants
- act within the terms of their accreditation at all times.

Case study 2: Modified CC issued for works already commenced

The complaint or issue

The Board received a complaint that the certifier issued a modified CC for works that had commenced.

Details

Council issued development consent for demolition and construction of a new two storey dwelling. The certifying authority later issued a CC. Council subsequently approved a section 96 application that included the modification of the plans to include a third habitable level as a basement containing a gym, change room and store room, changes to windows, a change to the pool configuration, construction of a rear balcony and fencing along the front boundary.

The complaint alleged that the certifier issued a modified CC when the building work had physically commenced on the construction of the basement floor.

Findings and outcome

Section 109F(1A) of the EP&A Act specifies a CC has no effect if it is issued after the building work is physically commenced on the land to which the relevant development consent applies.

Department of Planning Circular PD 06-004, issued on 13 February 2006, advises that this provision makes it clear a CC for building work cannot be issued after work has commenced.

The certifier sought legal advice before issuing the modified CC. This action complies with the Board's *Code of conduct for accredited certifiers*, in particular Requirements 6 and 7:

- 6. An accredited certifier shall take all reasonable steps to obtain all relevant facts when making decisions and carrying out certification and other statutory functions.*
- 7. An accredited certifier shall ensure that his or her decisions and actions are reasonable, fair and appropriate to the circumstances, based on consideration of all the relevant facts he or she has obtained, and supported by adequate documentation.*

Further, the Board's *Code of conduct: a guide* (March 2007) provides the following advice:

In making decisions, an accredited certifier needs to exercise reasonable judgement. Code of Conduct Requirement 7 does not require a certifier to make decisions without error. It is recognised that errors of judgement will occur. However, a certifier may breach this requirement if they act negligently, recklessly or unreasonably in issuing a complying development certificate, strata certificate or a Part 4A Certificate.

The Board's investigations found that the certifier acted reasonably in taking professional advice on whether to issue a modified CC, even though it could be argued that building work may have commenced. The allegation was found to have no basis and the matter was dismissed.

REMINDER: A CC cannot be issued, and has no effect if it is issued, after the building work is physically commenced. As this case illustrates, certifying authorities must exercise reasonable judgement when making decisions and taking actions.



Case study 3: Issue of interim OCs

The complaint or issue

The accredited certifier was alleged to have issued an interim OC for a change of use where fundamental site (external) works had not been completed, or where only a component of a development was in place and staged approval had not been sought.

Details

The complaint claimed the certifier issued an interim OC for a change of use prior to a CC being issued for external works including an on-site sewage management system, car parking, suitable driveway access and landscape works and prior to the relevant conditions of consent being met.

Findings and outcome

The EP&A Act requires an OC to be issued prior to a person commencing occupation or use of a building or part of a building. The Act and Regulation also require that before issuing an interim OC to allow a change of use, a certifying authority must be satisfied of certain matters, including that:

- there is a current development consent or CDC for the change of building use
- the building is suitable for occupation or use in accordance with its BCA classification
- the building will not constitute a hazard to the health and safety of the occupants of the building
- any preconditions required by the development consent to be satisfied before the issue of an OC have been satisfied.

Council must identify in the development consent the critical preconditions that are to be satisfied prior to the issue of an interim occupation certificate and consider which conditions might reasonably be satisfied after an occupation certificate is issued.

If relevant conditions of consent are not satisfied, Council can take enforcement action to require compliance, including the issuing of orders, compliance cost notices and penalty notices, and commencing court action.

The complaint against the certifier was not proven because:

- no evidence indicated a CC was required for the external works
- no specific conditions were attached to the development consent the certifier was required to have regard to relating to the change of use before issuing an interim OC.

REMINDER: Conditions of development consents are required to provide certainty for the applicant, the developer and the general public. If the consent authority considers there are critical preconditions that should be satisfied before the issue of an interim occupation certificate, these should be identified in the consent. Council should also consider which conditions might reasonably be satisfied after an occupation certificate has been issued.