

Summary of Selected Complaints & Investigations

Edition 6: September 2012

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: Critical stage inspections and fees for lodging Part 4A certificates

The complaint or issue

The Board received a complaint that an accredited certifier failed to notify the applicant of the need for a critical stage inspection of waterproofing to wet areas, and did not provide a copy of the construction certificate (CC) to the council or pay the fees for lodging the CC and occupation certificate (OC).

Details

Council issued development consent for the construction of a residence and swimming pool. The accredited certifier, appointed as the principal certifying authority (PCA), issued a CC for the development and provided Council with a notice of commencement of work and appointment of the PCA.

Seventeen months after the issue of the CC, Council advised the accredited certifier that it did not have a copy of the CC and had not received a lodgement fee. The accredited certifier provided Council with a replacement set of CC documentation, including a list of the required critical stage inspections. The certifier did not provide proof of payment of the lodgement fee.

The documentation showed the certifier had not notified the applicant that a critical stage inspection for wet area flashing was required.

The accredited certifier issued an interim OC for the development and a copy was provided to Council. The fee for lodging the OC was not paid. Council made repeated requests to the certifier to address the above matters.

Findings and outcome

Clause 142(2) of the Environmental Planning and Assessment Regulation 2000 (EP&A Regulation) requires a certifying authority to forward a copy of any CC to the relevant council within two days from the date of determination.

An accredited certifier who fails to pay council fees for lodging Part 4A certificates breaches Requirements 5 (to exercise reasonable care and attention in carrying out their duties and in the exercise of their powers) and 6 (take all reasonable steps to obtain all relevant facts when making decisions and undertaking certification and other statutory functions) of the Board's Code of Conduct.

Accredited certifiers must also, under section 81A(2)(b1)(ii) of the EP&A Act and clause 103A(f) of the EP&A Regulation, give the person with the benefit of the development consent a notice listing the required critical stage inspections. Under clause 162A(4) of the EP&A Regulation, this list should include an inspection prior to covering waterproofing in any wet area for Class 1 and 10 buildings.

The Board found the allegations proven and the certifier was reprimanded, fined \$2,000 and ordered to pay lodgement fees for the certificates to Council.

REMINDER: A notice of critical stage inspections required by the PCA must include all relevant inspections. This allows the principal contractor to arrange for the inspections to be conducted. Lodgement fees must be paid to Council for certificates issued by an accredited certifier.

Case study 2: Terms of CCs and matters to be inspected

The complaint or issue

An accredited certifier issued a CC which did not contain the necessary information required under the EP&A Regulation and failed to ensure compliance of the building work with the development consent during the critical stage inspections.

Details

A CC was issued by the accredited certifier for the construction of a two storey dwelling, awning, retaining walls and fence. When inspecting an adjoining property, Council observed non-compliances of the building work with the development consent at the subject property.

In reviewing the documentation submitted by the accredited certifier with the CC, Council found the certificate did not include:

- specifications in relation to the issue of the certificate
- a statement to the effect that work completed in accordance with documentation accompanying the application for the certificate will comply with the requirements of the EP&A Regulation
- endorsement of all plans forming part of the CC.

The CC also specified the installation of smoke detectors, instead of smoke alarms, to the ground and first floors of the dwelling, inconsistent with the requirements of the Building Code of Australia (BCA).

Construction of the dwelling was also shown by Council's surveyor to be closer to the street than had been approved. The accredited certifier indicated that, as the boundary of the property was not clearly marked, the encroachment was not obvious at the time of inspection.

Another certifier was commissioned to undertake two critical stage inspections of the steel for the footings on the PCA's behalf. It appeared the PCA did not inform the certifier that setbacks from the boundaries of the property had not been identified through a survey.

Findings and outcome

Clause 142(2)(c) of the EP&A Regulation requires that a CC forwarded to Council as part of an accredited certifier's notification of determination of the application must include relevant plans and specifications. Clause 142(3) of the EP&A Regulation says a reference to the issuing of a CC includes a reference to the endorsement of the CC on any relevant plans and specifications.

Further, clause 147(1)(e) of the EP&A Regulation requires that a CC provided to Council must include a statement to the effect that work completed in accordance with documentation accompanying the application for the CC (with any modifications verified by the certifying authority as shown on that documentation) will comply with the requirements of the EP&A Regulation as are referred to in section 81A(5) of the EP&A Act.

Part 3.7.2 of the BCA requires the installation of smoke alarms, not smoke detectors, for Class 1 and 10 buildings.

The certifier failed to detect the setback encroachment and did not inform the certifier acting on their behalf of the importance of confirming setbacks from boundaries, breaching Requirements 1, 5 and 6 of the Board's Code of Conduct by not acting in the public interest, nor exercising duties and powers with reasonable care or taking reasonable steps to obtain all relevant facts.

The certifier was reprimanded, fined \$5,000 and required to report to the Board on:

- steps taken to ensure that complying development certificates (CDCs), CCs and OCs comply with the EP&A Act
- methods employed when undertaking inspections under the EP&A Act and EP&A Regulation
- given the certifier's disciplinary record, steps taken to ensure that OCs are only issued for buildings suitable for occupation or use in accordance with the BCA classification
- methods employed to ensure all required information is submitted with an application for a CDC, CC or OC.

REMINDER: Accredited certifiers should ensure their documentation is complete when forwarding copies of CCs and OCs to consent authorities and local councils. The documentation must be in accordance with the requirements of the EP&A Act and EP&A Regulation.

Case study 3: Infrastructure SEPP requirements for complying development

The complaint or issue

An accredited certifier issued a CDC that did not comply with the State Environmental Planning Policy (Infrastructure) 2007 (the Infrastructure SEPP), was based on an incorrect BCA classification and indicated inconsistent details of the height of the proposed development.

Details

The development involved the construction of a communications tower, associated equipment shelter and high-security fence. The accredited certifier issued a CDC under the Infrastructure SEPP.

The certificate was issued without approval to remove native vegetation under the *Native Vegetation Act 2003* and the *NSW Threatened Species Conservation Act 1995* as required by Council's tree management policy.

The accredited certifier classified the proposed antenna tower and fence as Class 10a under the BCA, citing the 10 per cent rule in regard to the floor area of a storey as justification for the classification.

Part A3.2(a)(1) of the BCA stipulates that each part of a building must be classified separately where the parts of a building have a different purpose and provides a concession for the classification of the minor use where the floor area of the minor use is less than 10 per cent of the storey it occupies in the building. However, the buildings were stand-alone towers.

The CDC was issued with sets of plans that showed contradictory tower heights. Two of the plans showed heights greater than the 50 metre height permitted under the Infrastructure SEPP. These two plans were not stamped, despite being part of the documents submitted to Council in support of the CDC. As a result, the accredited certifier considered that they were not in breach of the Infrastructure SEPP.

Findings and outcome

Under section 85A(3) of the EP&A Act the determination of an application for a CDC must

determine whether the development complies with the provisions of the relevant environmental planning instrument (clause 20B(f) of the Infrastructure SEPP in this case).

Clause 20B(f) of the Infrastructure SEPP provides that complying development must not involve the removal or pruning of a tree or other vegetation that requires a permit or development consent for removal or pruning, unless that removal or pruning is undertaken in accordance with a permit or development consent. The clause further provides that the permit may be granted under a local environmental plan or the development consent may be approved under the *Native Vegetation Act 2003*. This Act requires development consent for the clearing of native vegetation. This requirement was not complied with in this case.

The appropriate classification of the development under the BCA was Class 10b; the 10 per cent rule did not apply as the proposal did not involve a building having a part which was to be used for a different purpose; the buildings were stand-alone structures. In this case, the certifier displayed a lack of understanding in relation to building classification. Requirement 5 of the Board's Code of Conduct had been breached in the accredited certifier's failure to exercise reasonable care in carrying out their duties.

The heights of the towers exceeded 50 metres and, as a result, the proposed development could not be assessed as complying development under the Infrastructure SEPP. The Board determined the drawings provided by the accredited certifier with the notice of determination of the CDC were part of the certificate, regardless of whether or not the drawings were stamped.

The Board found the allegations proven and cautioned the accredited certifier, having regard to the certifier's past disciplinary record.

REMINDER: The absence of a certifier's endorsement on drawings and other documents submitted as part of a notice of determination of an application of a CDC does not automatically exclude these documents from being part of a CDC. Compliance with the requirements of the Infrastructure SEPP must be carefully considered.

Case study 4: Pre-conditions to the issue of a construction certificate

The complaint or issue

An accredited certifier issued a CC for the clearing of vegetation, contrary to the requirements of the EP&A Act, which requires the issue of a CC for building work or subdivision work only.

Details

The proposed development involved the construction of a 2,145m² retail centre that included a supermarket and retail shops, toilet amenities, a service road and car parking.

An accredited certifier, acting as PCA, indicated to the developer the requirements in the development consent to protect indigenous vegetation, undertake a pre-clearing survey prior to commencement of any clearing works, and undertake a soil and water management plan. The PCA requested compliance with the conditions prior to any clearing works.

Following receipt of a plan addressing sediment control, but not a soil and water management plan, the accredited certifier issued a CC to clear the vegetation. During several episodes of heavy rain, this resulted in sediment-laden stormwater discharging from the site to the nearby watershed basin.

The issue of the CC was alleged to be invalid. A number of development consent conditions to be complied with prior to the issue of a CC were not complied with, including some relating to the provision of a soil and water management plan, detailed engineering design plans and specifications for a service road, pedestrian access and footpaths and bicycle/scooter parking.

The accredited certifier claimed Council's development consent was unclear as to when particular conditions were required to be satisfied.

Findings and outcome

The development consent required the compliance with certain conditions prior to, or in conjunction with, the issue of the CC. However, there were some conditions of consent which could be complied with at later stages of construction if CCs were issued for various stages of the work.

The accredited certifier erred in issuing a CC for clearing work, which is not building or subdivision work.

The Board, however, recognised the accredited certifier's intention to ensure compliance with the consent conditions relative to site controls when issuing the CC.

The allegation was proven and the certifier was reprimanded.

REMINDER: It is critical for development consent conditions to be clear statements that set out specific and relevant requirements. The certifier should discuss with the council any conditions that are ambiguous or are unclear.

Case study 5: Complying with the Codes SEPP

The complaint or issue

The Board received a number of complaints about the professional conduct of an accredited certifier, which included allegations that the certifier issued CDCs for developments that did not comply with the State Environmental Planning Policy (Exempt and Complying Development Codes) 2008 (the Codes SEPP), issued notices of intention to serve an order that had inaccurate or erroneous details, and failed to comply with the notification requirements of the EP&A Regulation involving information required under the *Home Building Act 1989*.

Details

The accredited certifier issued two CDCs for the construction of new two-storey dwellings on two sites, and an OC for a development that involved the demolition of an existing building and construction of a building containing 15 units and a basement car park.

The certifier issued two notices of intention to serve an order for each of the developments which were the subject of the CDCs.

Findings and outcome

In relation to each of the CDCs, the accredited certifier did not provide Council with an endorsed building specification. In addition, contrary to the provisions of the Codes SEPP, the certificates were issued before the required road opening consent was granted by the relevant authority, the excavation indicated in the plans exceeded the permissible depth and the front setback was less than the minimum requirement.

For one of the CDCs, lawful access to a public road was not obtained prior to the issue of the certificate.

The notices of intention to serve an order failed to identify the relevant allotments and did not indicate to whom representations about the notice could be made.

In regard to the residential units, the accredited certifier, acting as the PCA, failed to provide Council with the name and licence number of the principal contractor and failed to provide Council with the name of the insurer for the building work on both sites, as required under the *Home Building Act 1989* and clause 98B(2) of the EP&A Regulation.

The Board determined the actions of the accredited certifier constituted unsatisfactory professional conduct. Having regard to the certifier's disciplinary record, the certifier was reprimanded, suspended for 10 months, fined \$25,000, and a condition was placed on the certifier's accreditation preventing the certifier from issuing any CDC or CC for a short period prior to, and during, his suspension.suspended.

REMINDER: Accredited certifiers must comply with the requirements of the Codes SEPP and the *Home Building Act 1989* when issuing CDCs.

Case study 6: CCs and development consent conditions

The complaint or issue

An accredited certifier issued CCs at various stages of a development that variously:

- were issued prior to ensuring compliance with the development consent conditions
- approved plans including design modifications that were inconsistent with the development consent
- included work which had no development consent in force and which had commenced.

The accredited certifier was also alleged to have issued a notice of a proposed order without providing adequate direction that building works were required to be demolished and/or advice that an application to modify the development consent was required to be submitted to Council for determination of the unauthorised building works.

Details

Council issued development consent for demolition of the existing garage, carport and rear portion of the existing dwelling, and alterations and additions to the rear of the existing dwelling, new double garage and in-ground swimming pool. The consent specified certain conditions to be complied with prior to the issue of the CC.

The accredited certifier issued multiple CCs in the course of the building work, including amendments to previous CCs issued.

Findings and outcome

A CC was issued despite the following development consent conditions, being preconditions to the issue of the CC, not being met:

- notation in plans or specifications of the provision of mains-powered smoke alarms

- complying with the relevant Australian Standards
- submission of amended plans demonstrating compliance with limits to the external wall height of the double garage measured from the existing natural ground level to the underside of the roof covering
- submission of amended plans showing a fixed privacy screen on the northern end of the rear deck with minimum height measured from the floor
- submission to the certifier of amended plans showing that the garage roof pitch did not exceed 25 degrees
- submission to the certifier of amended plans showing that the skylights had been deleted from the plans for the garage
- certification of the stormwater drainage plan by a practising civil/hydraulic engineer.

The issue of the CC prior to the conditions having been met breached clause 146(c) of the EP&A Regulation.

The certifier subsequently issued another CC, approving plans which included design modifications that were inconsistent with the development consent, contravening clause 145(1)(a) of the EP&A Regulation. These modifications commenced with no valid development consent in force. Later, the certifier issued an amended CC for this work in further breach of section 109F(1)(a) of the EP&A Act and Requirements 1, 5, 6 and 7 of the Board's Code of Conduct that mandate accredited certifiers to promote the public interest, exercise reasonable care in carrying out their duties and exercising their powers, take reasonable steps to obtain relevant facts when making decisions and ensure that these decisions are reasonable, fair and appropriate to the circumstances.

The certifier issued a notice of a proposed order under section 109L of the EP&A Act which directed the owner to comply with the development consent. This was inadequate, as advice was not given to the owner that building work was required to be demolished and/or that an application to modify the development consent was required to be submitted to the council in relation to the unauthorised building work.

The Board found the allegations proven and the certifier was found guilty of unsatisfactory professional conduct. The accredited certifier was reprimanded and fined \$7,500.

REMINDER: A CC can only be issued under the EP&A Act and Regulation where, among other things, there is a development consent in force, work has not started, and relevant conditions of consent have been satisfied.

Accredited certifiers need to carefully formulate the terms of notices issued under section 109L of the EP&A Act so the applicant is clear about action required to satisfy the notice and to facilitate the work of councils issuing orders.

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September 2012
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