

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: Fire safety requirements in issuing final OCs

The complaint or issue

An accredited certifier issued a final occupation certificate (OC) for a building that was not suitable for occupation or use in accordance with its classification under the Building Code of Australia (BCA) in regard to fire safety.

Details

A final OC was issued by the accredited certifier acting as the principal certifying authority (PCA) for the construction of an additional storey to an existing single-level school building. The final OC was issued three and a half years after another accredited certifier conducted the final inspection for the development on behalf of the PCA. No defects had been identified at the final inspection by the accredited certifier.

The certification relied on by the PCA to issue the OC included certification attached to the construction certificate (CC) stating that the building was of Type B construction and would meet the requirement of the BCA and Table 4 of Specification C1.1 in regard to the fire rating level (FRL).

Certification from a structural engineer was also obtained by the applicant for the OC prior to the issue of the final OC, indicating compliance of the masonry installation with AS 3700 (2001). The applicant also obtained a final fire safety certificate.

Findings and outcome

The legislation in place at the time the PCA was appointed and the final inspection undertaken did not require critical stage inspections; it was up to the PCA to determine the type and manner of inspections. However, the requirement for critical stage inspections, including a final PCA inspection, was in effect when the application for the final OC was lodged. The PCA issued the final OC without conducting an inspection close to the time the OC was issued.

The Board's investigation and site inspection revealed that the construction of the external wall on one side of the building did not comply with the requirements of clause C1.1 (Fire Resistance and Stability) of Part C1 of the applicable BCA (1996) which required an FRL of not less than 120/120/120. Non-compliance with this requirement posed a threat to occupants of the school building.

The protection of openings in the external walls of the building also did not comply with the requirements of clause 3.2 (Protection of Openings in External Walls) of Part C3 of the BCA; the windows were not protected by wall-wetting sprinklers and could only be opened manually. The fire safety certificate did not include the essential fire safety measures of wall wetting sprinklers and drencher systems.

The Board found the allegations proven and the accredited certifier was reprimanded and fined \$3,000.

REMINDER: A final critical stage inspection must be carried out by the PCA. Where a significant period has lapsed between the last inspection and the lodgement of an application for a final OC, it is prudent for a fresh inspection to be undertaken to ensure compliance of the development with the requirements of the EP&A Act.

Case study 2: Unauthorised issue of an OC

The complaint or issue

The Board investigated an accredited certifier in relation to the issue of an OC without the required authority.

Details

Development consent was issued for the erection of a six storey residential flat building with 29 units and a basement car park. A private accredited certifier issued the CC.

An OC was issued by another accredited certifier who was accredited at the time under the Building Surveyors and Allied Professions (BSAP) Accreditation Scheme as an Accredited Certifier Building Grade 2 and a PCA - Building (Grade 3).

Findings and outcome

The OC was issued at a time when a number of accreditation schemes were being administered by industry bodies, prior to the commencement of the *Building Professionals Act 2005*. The BSAP Accreditation Scheme did not authorise PCA – Building (Grade 3) accredited certifiers to issue OCs for buildings of six storeys.

The Board found the accredited certifier's action in issuing the OC to be outside the terms of their accreditation, thereby breaching the standards of conduct of a reasonably competent certifying authority.

The then section 109ZH(1)(a) of the *Environmental Planning and Assessment Act 1979* (EP&A Act) provided that any person who issues a Part 4A certificate or complying development certificate who is not authorised under the Act to issue is guilty of an offence against the Act. The Board determined this provision applied to the conduct of the accredited certifier.

The Board found the allegations proven and the accredited certifier was reprimanded, fined \$1,000 and suspended for two months.

REMINDER: Accredited certifiers must act within the terms of their accreditation and authority in accordance with the Building Professionals Act and Regulation. Certifiers may face disciplinary action for a breach of the EP&A Act and the Board's Code of Conduct for Accredited Certifiers.

Case study 3: Compliance with consent conditions in regard to bushfire safety

The complaint or issue

An accredited certifier issued a CC without complying with a condition of the development consent in respect to bushfire requirements. The certifier also issued an OC for the development when the building was not suitable to be occupied.

Details

A council issued development consent for alterations and additions to an existing dwelling, including a new swimming pool with an attached timber deck on bushfire prone land. The consent had specific conditions relating to bushfire safety. The consent also specified that detailed construction drawings, specifications and other supporting documentation required for a CC were to accord with the terms of the consent and comply with the requirements of the BCA.

Three consent conditions required different elevations and elements of the building work to be constructed to specific bushfire attack levels (BALs). These conditions were required to be complied with prior to the occupation of the development. In particular, one condition required that all new Class 10 structures, as defined by the BCA, attached to, or within 10 metres of the habitable building, were to comply with section 8 (BAL 40) of the Australian Standard on construction of buildings in bushfire prone area. Another condition required that the window assemblies and external doors for new construction should comply with Australian Standard 3959-2009.

The accredited certifier issued a CC and OC for the development.

Findings and outcome

Clause 145(1)(b) of the Environmental Planning and Assessment Regulation 2000 (EP&A Regulation) provides that a certifying authority must not issue a CC for a building unless the proposed building will comply with the relevant requirements of the BCA.

The Board found the CC issued by the accredited certifier, including the accompanying building specifications and the endorsed building plans, provided no details as to how the building work would comply with clause 3.7.4.0 of the BCA for a building constructed in a designated bushfire prone area.

Clause 146(c) of the EP&A Regulation requires compliance with each condition of the development consent that must be complied with before a CC can be issued, before the issue of the CC.

The certifier failed to satisfy clauses 145(1)(b) and 146(c) of the EP&A Regulation in issuing the CC without the required details.

The Board's investigation also found that, contrary to a consent condition required to be satisfied prior to the issue of the OC, the timber decking around the swimming pool was located within 10 metres of the dwelling and did not comply with the requirements of Australian Standard 3959-2009. Further, the windows and glazed doors to the northern and western elevations of the building extension were not fitted with fire shutters and non-combustible doors, as required by the Standard.

The accredited certifier was found to have breached section 109H(2) of the EP&A Act which prohibits the issue of an OC unless preconditions to the issue of the certificate, as specified in the development consent, have been met.

The Board found the allegations proven and the accredited certifier was reprimanded and fined \$3,000.

REMINDER: Accredited certifiers must ensure compliance with the specified preconditions before issuing construction and occupation certificates.

Case study 4: Compliance with terms of accreditation

The complaint or issue

A CC was issued by an accredited certifier outside the terms of their accreditation, was issued without a fire safety schedule and was issued even though the development did not comply with the requirements of the BCA.

Details

The development involved the erection of a six storey residential flat building including a basement car park. The accredited certifier issued the CC.

The Board determined that, at the time of issue of the CC, the certifier was accredited by the Institution of Engineers Australia (IEA) as an Accredited Certifier Structural Engineering. The IEA accreditation scheme provided that an accredited certifier could only issue compliance certificates for the construction of a building and subdivision work. Only those accredited as a Principal Certifier Building (unrestricted) could issue complying development certificates, CCs, compliance certificates and OCs with respect to building matters and issue strata certificates. In effect, the certifier did not have the authority to issue a CC. The Board's investigation also indicated that the CC did not include a fire safety schedule.

In relation to the CC plans and specifications, the openings in the path of travel via fire-isolated exits were not protected, contrary to the requirements of D1.7 (c) and C3.4 of the BCA.

Findings and outcome

The Board determined that the accredited certifier acted outside the terms of their accreditation in issuing the CC. The Board further determined that the certifier breached the standard of conduct of a reasonably competent and diligent accredited certifier and was guilty of an offence against the EP&A Act in issuing a Part 4A certificate they were not authorised to issue.

Further, the absence of a fire safety schedule as part of issuing the CC was found to contravene clause 168(1)(c) of the EP&A Regulation that requires a person issuing the CC to also issue a fire safety schedule that specifies the fire safety measures to be implemented in the building premises.

Issuing the CC despite non-compliance with BCA requirements contravenes clause 145(1)(b) of the EP&A Regulation which prohibits the issue of a CC unless the proposed building work complies with the relevant requirements of the BCA.

The Board found the allegations proven. The accredited certifier was cautioned and fined \$5,000.

REMINDER: A CC for building work may be issued where, amongst other things, the proposed building will be not inconsistent with the relevant requirements of the BCA, and must be accompanied by a fire safety schedule.

Case study 5: Ensuring currency of information in determining CDCs

The complaint or issue

An accredited certifier determined an application for a complying development certificate (CDC) under a council development control plan (DCP) for exempt and complying development instead of the State Environmental Planning Policy (Exempt and Complying Development Codes) 2008 (Codes SEPP).

Details

The development involved the construction of a verandah for an existing dwelling. An application for a CDC was made under Council's DCP for exempt and complying development and was determined by the accredited certifier.

Planning Circular 10-027 (reinforced in PS 11-023) indicates that determinations of CDC applications under a council's exempt and complying development controls could only be made before 1 September 2011. After this date, an application for a CDC had to be determined under the Codes SEPP.

Documents showed the application date for the CDC and the date of issue of the certificate was after 1 September 2011. During the investigation of the complaint, the applicant issued a statement advising that the application was lodged prior to that date, although the investigation found the application form was only signed after that date, after the applicant was contacted by the certifier.

The application was also not endorsed by the certifier with the date of receipt and, when lodged, contravened Part 2, Schedule 1 of the EP&A Regulation because:

- no list of the documents accompanied the application
- the LEP and DCP names were not included
- the estimated area (if any) of asbestos that would be disturbed/removed was not addressed
- the application was not accompanied by site plans, sketches, a detailed description, appropriate plans and specifications
- there was not a sufficient description of the development.

The above deficiencies should have been addressed prior to 1 September 2011 in order for a valid application to have been made before that date.

Findings and outcome

The Board considered that there was no valid application for the CDC prior to 1 September 2011 and accordingly, the accredited certifier was not entitled to issue the CDC under the DCP for exempt and complying development.

The investigation found the certifier did not comply with Requirements 5 and 6 of the Board's Code of Conduct for Accredited Certifiers which require certifiers to exercise reasonable care and attention in carrying out their duties and in the exercise of their powers, and require certifiers to take reasonable steps to obtain all relevant facts in making decisions and undertaking certification functions.

The Board found the allegations proven and the accredited certifier was reprimanded and fined \$2,000.

REMINDER: An application for a CDC must be assessed against the requirements that are in force at the time of lodging the application.

Case study 6: Issue of CC that is inconsistent with development consent

The complaint or issue

An accredited certifier issued a CC that was inconsistent with the development consent in that it included plans showing a lift, an additional residential unit and additional car parking level which were not part of the development consent.

Details

Council issued development consent for the construction of a residential flat building containing five two-bedroom apartments and a basement car park. A CC was issued for bulk excavation on the site by an accredited certifier who was also appointed as the PCA.

A replacement PCA was appointed after a year and a half from the issue of the CC for the bulk excavation. A further CC was also issued at that time for the erection of multi-unit housing containing five two-bedroom dwellings and basement car parking.

Six months after the issue of the latter CC, a neighbour complained about an additional apartment being constructed on the site, contrary to the development consent. A representative of the certifier advised the neighbour that the builder was informed about the complaint and the builder gave assurance that all work was in accordance with the approved drawings. Soon after this, Council inspected the site and issued an order under section 121B of the EP&A Act to cease all work. Council believed the building under construction was not in accordance with the development consent.

Findings and outcome

The Board found that the CC plans showed features that were not part of the development consent, including a shaft containing a lift, an additional residential unit and an additional car parking level.

The plans were considered to breach clause 145(1)(a) of the EP&A Regulation which prohibits a certifying authority issuing a CC for building work unless the design and construction of a building are not inconsistent with the development consent.



The certifier was also considered to have breached Requirements 1, 5, 6 and 7 of the Board's Code of Conduct for Accredited Certifiers in not acting in the public interest, not exercising their duty of care in exercising their powers, not taking reasonable steps to obtain relevant facts in making decisions and not ensuring the decisions made were reasonable and appropriate to the circumstances and supported by adequate documentation.

The CC was also found to have been issued without a compliant fire isolated stairway to the proposed building, contrary to the provisions of Part D1.3 of the BCA and clause 145(1)(b) of the EP&A Regulation.

The Board found the allegations proven and the certifier was reprimanded and fined \$50,000. The certifier's accreditation was cancelled and the certifier was prohibited from re-applying for accreditation for five years. The certifier was also disqualified for the same period from being an accredited certifier-director, or being otherwise involved in the management of an accredited body corporate.

REMINDER: In issuing a CC, accredited certifiers must ensure the design and construction of the building, as shown in the plans and other documents, are not inconsistent with the development consent.

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