



To: All accredited certifiers in NSW
All councils in NSW
Other stakeholders

6 January 2005

Accredited Certifiers and Conflict of Interest

The NSW Administrative Decisions Tribunal (ADT) has recently made significant decisions on the need for accredited certifiers to avoid both perceived and actual conflicts of interest. The ADT's decisions are in *Director-General, Department of Infrastructure, Planning and Natural Resources v Stapleton (No 2) [2004] NSW ADT 70* and *(No 3) [2004] NSW ADT 24*. These decisions were the result of disciplinary proceedings brought by the Director-General against Mr Mark Stapleton, an accredited certifier, following an audit of his certification work. The ADT found Mr Stapleton guilty of unsatisfactory professional conduct.

I have attached for your reference extracts from the ADT's decisions and a summary of the Stapleton case as printed in the Department's recently issued Building Professionals Board Bulletin. The full judgments are available on the ADT's website as referenced in the attachment.

Having regard to these judgments, and to the requirements of section 109ZG of the *Environmental Planning and Assessment Act 1979*, it is the Department's view that an accredited certifier should not act as a certifying authority or principal certifying authority for a development where they have provided assistance in the approvals process, including:

- Preparing development applications or submitting those applications to Council for approval
- Signing any applications for development consent
- Acting as an agent for the client in the submission of applications for development consent, complying development certificates, Part 4A certificates or to appoint the principal certifying authority
- Paying development application fees
- Paying long service levy payments, section 94 contributions, payments for security (footpath damage etc), home warranty insurance payments etc
- Obtaining any third party approvals (eg. Water authority approvals) or providing assistance to achieve compliance with conditions of consent (other than those conditions which are defined by legislation as the responsibility of the certifying authority)
- Providing any design advice to the client
- Providing advice concerning areas of non-compliance with the development consent or Building Code of Australia prior to the application for a construction certificate or appointment of the principal certifying authority being made.

As stated in the BPB's Bulletin, the 'Chinese wall' arrangements imposed by the ADT as a condition of Mr Stapleton's accreditation are designed to ensure that an accredited certifier employed in Mr Stapleton's firm would be free from influence, or a perception of influence, of his or her employer who is carrying out consultancy services. Different arrangements will be

suitable for different types of business. Certifiers should note that implementing the Stapleton Protocol will not necessarily provide complete protection from a possible finding of unsatisfactory professional conduct. Accredited certifiers should seek their own legal advice about business arrangements suitable for their circumstances to avoid actual or perceived conflicts of interest.

Yours sincerely

A handwritten signature in black ink that reads "Neil Cocks". The signature is written in a cursive, slightly slanted style.

Neil Cocks
Director
Building Professionals Board

Important decision on conflict of interest

The NSW Administrative Decisions Tribunal (ADT) has stressed the importance of accredited certifiers avoiding having “close relationships” with their clients which may result in perceived or actual conflicts of interest. This statement was made by the ADT in its finding that Mr Mark Stapleton, an accredited certifier, was guilty of unsatisfactory professional conduct under Section 109R of the Environmental Planning and Assessment Act. Proceedings against Mr Stapleton were commenced by DIPNR following an audit of his certification work.

The ADT stated that:

what is required by the conflict of interest standard is a separation of the consultancy role and the certification role sufficient to satisfy a reasonably-informed member of the general public that there is no likelihood that the accredited certifier might be influenced by the performance of the consultancy role and might lack the necessary objectivity.

Mr Stapleton’s firm prepared a statement of environmental effects, an energy efficiency scorecard and lodged and issued the construction certificate for the development.

The ADT also said:

There may be a public perception, in particular, that the accredited certifier might not fearlessly perform their duty to the public because of the pecuniary benefit they or their firm derives from having the applicant as a general client of the firm

The ADT imposed a condition (“the Stapleton Protocol”) on Mr Stapleton’s accreditation to avoid future breaches of the conflict of interest provisions of the EP&A Act. Certifiers should note that implementing the Stapleton Protocol will not necessarily provide complete protection from a possible finding of unsatisfactory professional conduct. The ‘Chinese wall’ arrangements in the Stapleton Protocol are designed to ensure that an accredited certifier employed in Mr Stapleton’s firm would be free from influence, or a perception of influence, by his or her employer who is carrying out consultancy services. Different arrangements will be suitable for different types of business. Accredited certifiers should seek their own legal advice about business arrangements suitable for their circumstances to avoid actual or perceived conflict of interest.

DIPNR will be issuing further advice on conflict of interest shortly. See *Recent complaints and audit findings* for a summary of the Stapleton case.



Director-General, Department of Infrastructure, Planning and Natural Resources v Stapleton (No 2) [2004] NSW ADT 70 and (No 3) [2004] NSW ADT 247

Allegations: That Mr Stapleton breached the EP&A Act by

- (1) Signing the application for a construction certificate for the development and then issuing the construction certificate applied for (breach of section 109ZG(1)(c))
- (2) Signing the notice of commencement and appointment of a principal certifying authority (PCA) for the development when he was the PCA (breach of section 81A)
- (3) (i) Not issuing the occupation certificate for the development when he was the PCA (breach of section 109D(2)) and allowing an employee to issue the occupation certificate when that employee was not the PCA and
(ii) not obtaining approval under section 109E(3) to replace Mr Stapleton as the PCA.

That Mr Stapleton failed to meet the standards expected of a reasonably competent accredited certifier by

- (4) Signing the development application (DA) for the development as the applicant without having the written consent of the owner of the land (breach of clause 49 of the EP&A Regulation 2000 and/or breach of clause 283 of the Regulation).

That Mr Stapleton failed to comply with

- (5) the Building Surveyors and Allied Professions Accreditation Board Scheme Code of Conduct.

Decision: Allegations (1) and (3)(i) were proven. Guilty of unsatisfactory professional conduct. Cautioned issued. The ADT imposed a condition on Mr Stapleton's accreditation requiring adherence to a specific protocol on standards of conduct as an accredited certifier.

Details: The allegations followed a DIPNR audit of Mr Stapleton's business. Mr Stapleton's firm was described as building consultants and accredited private building inspectors. The firm had prepared a statement of environmental effects and an energy efficiency scorecard for the development (a single dwelling) and lodged and issued the construction certificate.

Justice O'Connor noted that "the accredited certifier carries out an important public function – the certifier's certificates provide a guarantee to the community that certain critical requirements in the building and development process have been satisfied. The community is concerned to ensure that the system of certification operates free from improper influence and more serious forms of corruption."

The ADT emphasised the objective of the conflict of interest provisions, which was to establish an arms length relationship between developer and accredited certifier. The relevant test in this case was not whether there was actual bias but the appearance of bias, according to the ADT.

The ADT stated that "The public would expect... high standards of objectivity to be observed. There is clearly a risk of pre-judgment of the question of compliance in circumstances where the accredited certifier has also been responsible for framing the application and possibly having to advocate its acceptance to the council."

The ADT specifically stated that even if Mr Stapleton's practice was (as argued by him) usual in the industry the accredited certifier was required to observe the standard required by law and these factors did not excuse him from compliance with his legal obligations.

The ADT found that in not issuing an occupation certificate, where he was appointed PCA, Mr Stapleton contravened the EP&A Act. According to the ADT, through section 109D(2) "a duty is cast on the PCA personally to determine whether to issue an occupation certificate..."

Full copies of the judgements are available at www.lawlink.nsw.gov.au/adtjudgments/2004nswadt.nsf to view judgement No 2. and www.lawlink.nsw.gov.au/adtjudgments/2004nswadt.nsf to view judgement No 3.